

# INDEX

	Page
Chronological listing of relevant docket entries.....	II
Notice of motion seeking order dismissing indictment for failure to prosecute—filed February 19, 1971.....	1
Memorandum in support of defendant's motion to dismiss—filed February 19, 1971.....	2
Answer to defendant's motion to dismiss indictment for failure to prosecute—filed March 8, 1971.....	13
Opinion, Court of Appeals, decided August 16, 1972.....	<del>22</del> 16
Judgment.....	22
Order on remand—filed August 29, 1972.....	23
Order denying rehearing—September 7, 1972.....	24
Order granting motion for leave to proceed in forma pauperis and granting petition for writ of certiorari.....	24

(I)

## II

### CHRONOLOGICAL LISTING OF RELEVANT DOCKET ENTRIES

May 26, 1970.....	Indictment returned and filed in District Court.
Feb. 9, 1971.....	Counsel appointed for defendant. Defendant entered a plea of not guilty. Cause set for trial for March 29, 1971.
Feb. 19, 1971.....	Defendant filed a motion to dismiss the indictment for lack of prosecution.
Mar. 18, 1971.....	Called for Hearing on Defendant's Motion to Dismiss the Indictment Because of Insufficient Evidence Before the Grand Jury and Defendant's Motion to Dismiss The Indictment for Failure of a Speedy Trial. Counsel's arguments heard. Both Motions are Denied.
Mar. 29, 1971.....	Jury trial commenced and completed. Verdict of jury found defendant guilty as charged in the indictment.
May 4, 1971.....	Defendant Sentenced To the Attorney General of the United States For a Period of Five Years. Sentence to Run Concurrently With The Sentence Now Being Served In The Nebraska State Penitentiary.
May 18, 1971.....	Notice of appeal filed.
Aug. 18, 1972.....	Opinion of Court Appeals.
Aug. 17, 1972.....	Mandate received by District Court, remanding with directions to enter an order instructing the Attorney General to credit the defendant with the period of time elapsing between the return of the indictment and the date of the arraignment.
Aug. 29, 1972.....	Order entered by District Court instructing the Attorney General to credit the defendant with the period of time elapsing between the return of the indictment and date of arraignment, a total of 259 days, the credit being applied to the sentence of imprisonment for a period of five years imposed in the District Court on May 4, 1972 [sic].

# In the Supreme Court of the United States

OCTOBER TERM, 1972

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No. 72-5521

CLARENCE EUGENE STRUNK, PETITIONER

v.

UNITED STATES, RESPONDENT

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT  
OF APPEALS FOR THE SEVENTH CIRCUIT

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In the United States District Court for the Eastern District  
of Illinois

Document No. 13

Criminal No. 70-44

Section 2312, Title 18, United States Code

UNITED STATES OF AMERICA, PLAINTIFF

v.

CLARENCE EUGENE STRUNK, AKA, ALBERT GARDNER WAGNER,  
DEFENDANT

*Notice of Motion Seeking Order Dismissing Indictment for  
Failure to Prosecute—Filed February 17, 1971*

Defendant shows to the Court:

1. The indictment against him was returned on May 26, 1970.
2. He was arrested on July 23, 1969, and has remained in custody to the present time.

3. His whereabouts have been known to the United States Attorney throughout this period.'

4. At all times since his arrest defendant has been ready for trial and has repeatedly requested that the proceeding be brought to trial;

5. The United States Attorney for the Eastern District of Illinois has failed and refused to permit the defendant to be brought to trial;

WHEREFORE, defendant moves that the indictment herein be dismissed for unnecessary delay in bringing the defendant to trial.

Dated: February 18, 1971.

(S) A. WENDELL WHEADON,  
Attorney for Defendant, Welch, Wheadon & McCaskill,  
310 N. 10th Street, Suite 100, East St. Louis,  
Illinois 62201—(618)274-4010.

[Proof of Service omitted in printing]

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In the United States District Court for the Eastern District  
of Illinois

Document No. 14

Criminal No. 70-44

UNITED STATES OF AMERICA, PLAINTIFF

v.

CLARENCE EUGENE STRUNK, AKA, ALBERT GARDNER WAGNER,  
DEFENDANT

*Memorandum in Support of Defendant's Motion To Dismiss—  
Filed February 19, 1971*

Comes now the defendant, CLARENCE EUGENE STRUNK, also known as ALBERT GARDNER WAGNER, by and through his attorney, A. WENDELL WHEADON, in the above entitled action and requests this Honorable Court to dismiss the indictment currently on file against him at this time in the United States Attorney's office, Eastern District of Illinois. In support thereof, the defendant submits the following memorandum:

The lengthy and continuing failure of the United States Authorities to prosecute the criminal charge against him in this case has violated and is violating his constitutional rights to a speedy trial as guaranteed in the Sixth and Fourteenth Amendments to the United States Constitution. Specifically the defendant contends:

1. The rights to a speedy trial is a federal constitutional right and, accordingly, must be enforced on the basis of federal, as opposed to state, standards;

2. The right to a speedy trial accrues to one incarcerated in a prison of another jurisdiction regardless of his demand on his part, and the right is not waived from mere silence or inaction by the prisoner;

3. The application of federal standards insuring the right to a speedy trial compels the conclusion that the Defendant's right to a speedy trial was violated and is being violated in this case.

#### A. THE RIGHT TO A SPEEDY TRIAL—A FEDERAL CONSTITUTIONAL RIGHT

In 1967 the United States Supreme Court lifted the right to a speedy trial from a previously assigned second-class stature by recognizing that it was "one of the most basic rights preserved by our Constitution. *Klopfer vs. North Carolina*, 386 U.S. 213, 226 (1967)" Klopfer had been indicted on a North Carolina criminal trespass charge arising out of a civil rights demonstration. After his trial ended in a mistrial, the case was postponed for two terms. The trial court, over Klopfer's objection, then granted the prosecutor's motion for a "*nolle prosequi* with leave" a procedural device in use only in North Carolina whereby the accused is discharged from custody but remains subject to prosecution at any time in the future at the discretion of the prosecutor. The United States Supreme Court held that by indefinitely postponing prosecution of the indictments, the state denied Klopfer the right to a speedy trial guaranteed to him by the Sixth Amendment to the United States Constitution, which the Court made expressly applicable to the States under the Fourteenth Amendment to the United States Constitution.

The Defendant concedes that prior to *Klopfer* there was a tendency on the part of various state courts to emphasize the relativity of the right to such other factors as comity, dual

sovereignty, punishment, convenience and cost. See 77 Yale L.J. 767, *Effective Guaranty of a Speedy Trial for Convicts in Other Jurisdictions* (1968).

The rationale of comity and dual sovereignty, however, holds little weight in this day and age, particularly with reference to a basic constitutional right. As recently stated in 77 Yale L.J. 767, *Effective Guaranty of a Speedy Trial for Convicts in Other Jurisdictions*, at 771-72 (1968):

While such notions of sovereign dignity are anachronistic, the argument may have had some practical basis in the past when extradition was at best a tricky affair. Extradition procedures were complicated, and it was often held that a state permanently waived jurisdiction over a convict whom it released into the custody of another state. However, the Uniform Criminal Extradition Act, now in force in all but six states, today provides for a safe and simple extradition procedure between states. Statutory and case law has similarly simplified the process of granting temporary custody between state and federal jurisdictions. These procedural reforms leave little force in an argument which elevates the small danger of a rebuff of one sovereign by another above the concrete evils which can result from denial of a speedy trial.

Recently in *Richardson vs. State*, 428 P. 2d 61 (Idaho 1967), the Supreme Court of Idaho addressed itself to the issue of a state's duty to initiate procedures for the return of a prisoner to the state for purpose of trial, and expressly rejected the dual sovereignty rationale. In the course of its opinion the Court quoted with approval the following from *Commonwealth vs. McGrath*, 348 Mass. 749, 205 N.E. 2d 710 (1965):

The decisions which have adopted a contrary position are unconvincing. Some of them reason that a State need not request the delivery of a person incarcerated elsewhere because it cannot demand his custody as a matter of unqualified right. But we fail to see why the lack of an absolute right excuses the exercise of due diligence. Other decisions are based on the notion that the defendant's absence from jurisdiction is the result of his own wrongdoing. This, however, is not a situation where the accused is voluntarily remaining without the Com-

monwealth. Nor is it a case where the Federal authorities have refused to release him. \* \* \* Here, the delay in the trial of the defendant for a crime of which he is presumed innocent can be prevented.

Although notions of dual sovereignty have in the past been used as a basis for denial of one's right to a speedy trial, one author submits that the real reason for delaying the trial of a convict in another jurisdiction are punishment, convenience and cost. 77 Yale L.J. 767, 772-73, *Effective Guaranty of a Speedy Trial for Convicts in Other Jurisdictions* (1968) deposes of the reasons as follows:

Apart from conceptualism and lingering fictions, the true reasons for delaying trial of convicts in other jurisdictions are punishment, convenience and cost. Punitive motives often predominate. One prosecutor wrote that a convict could "sit and rot in prison" rather than be brought promptly to trial in the prosecutor's jurisdiction. Presumably most prosecutors are not so callous, but many prosecutors are doubtless little troubled by the realization that delay causes anxiety, makes convict's eventual defense more difficult, and eliminates the possibility of concurrent sentences. Many detainees are apparently filed for punitive reasons; they are withdrawn shortly before the convict's release, having served their purpose by curtailing prison privileges and preventing parole. Satisfaction of the punitive impulse is, of course, no justification for permitting prosecutors to delay trials of convicts in other jurisdictions.

In addition to satisfying the retributive urge, delaying the trials of convicts in other jurisdictions is convenient for overworked prosecutors who welcome the chance to postpone some cases on a typically crowded docket. Yet docket-lighting considerations do not override the right to a speedy trial of other defendants; there seems no good reason why it should relieve prosecutors of the obligation to try convicts in other jurisdictions promptly.

Finally, the majority rule is rationalized on the grounds that securing temporary custody of the defendant and transporting him to and from trial costs money. Extending the right to a speedy trial to convicts in other jurisdictions would force the accusing jurisdiction to spend this money or drop the case.

The costs of temporary extradition usually are not substantial, however, and the accusing jurisdiction will face many of the same costs if it brings the convict to trial *after* his sentence in the other jurisdiction has run. Moreover, if the convict can serve his sentences concurrently, the total cost of his imprisonment and rehabilitation will often be much smaller. Even aside from this possibility, however, recognition of the right to a speedy trial will certainly cost less than the enforcement of other rights, such as the right to counsel, which can no longer be distinguished as more "basic" after *Klopfer*.

As a further reason for delaying prosecution of convicts in other jurisdictions—particularly in those cases of the so-called "white collar" crimes where monetary loss is involved—the Defendant cites his desire for restitution on the parts of many prosecutors. Where there is substantial evidence of guilt, where the charges represent one episode in a series of similar episodes involving other jurisdictions, and where the accused has already been incarcerated in one of the other jurisdictions, frequently the best interests of justice and society may be served by the payment of restitution in lieu of prosecution. In the case of the indigent defendant, however, this may well create a dilemma: he is willing to make restitution but has no source of income outside of prison earnings. Sufficient prison earnings, in turn, are dependent upon the prisoner's eligibility for work release programs which are available in many states and the eligibility is denied by the custodial restrictions imposed by the detainer or warrant. Clearly, then, the solution must lie in the application of the federal speedy trial rationale so that the accused may receive a concurrent sentence (thereby removing the custodial restrictions of the detainer or warrant) or a probationary sentence with restitution as a condition of probation. Even a more obvious solution would be the removal of the warrant or detainer (but not the cancellation of the charge) so that restitution could be made without the expense of trying the prisoner. To deny a prisoner access to any of these three remedial avenues for a substantial period of time is not only to deprive him of his rights to a speedy trial but also to lessen the possibility of restitution to the concerned jurisdiction.

## B. THE ABSENCE OF DEMAND AND THE ISSUE OF WAIVER

The Defendant concedes that since he has been incarcerated in the Nebraska Penal Complex from September 1969, to date, he has made no formal demand upon this court to furnish him a speedy trial. The issue of whether a demand by an out-of-state prisoner is necessary to preserve his constitutional right to a speedy trial is really the issue of whether inaction or silence constitutes a waiver of that right.

The constitutional right to a speedy trial does not germinate from a written or oral request from an out-of-state prisoner; the right pre-exists any act of the accused with reference to the right. Fundamental principles of constitutional doctrine are applicable here. A valid waiver is never presumed simply from the silence of an accused. *Miranda vs. Arizona*, 384 U.S. 436 (1966). As stated in the Supreme Court in *Carnley vs. Cochran*, 369 U.S. 506, 516 (1962):

Presuming waiver from a silent record is impermissible. \* \* \*

The issue of waiver by non-demand on the part of an out-of-state prisoner was before the Court in *United States vs. Chase*, 135 F. Supp. 230 (N.D. Ill. 1955):

In summary, petitioner has not by mere knowledge (if he had it) waived his constitutional right to a speedy trial. The stakes are too high to apply a waiver without some overt act on his part. \* \* \* Further, a waiver will not be implied when the action required to avoid it is virtually impossible.

While it is easy to say that a man confined to Alcatraz should take active steps in his own behalf, there are practical obstacles in his path which make it easier to say than to do. Accordingly, the requirements of demanding a speedy trial, and his failure to take action, will not be construed as a waiver of his rights.

Also see *People vs. Winfrey*, 281, N.Y.S. 2d 823 (Ct. of App. N.Y. 1967); *Pitts vs. North Carolina*, 395, F. 2d 182 (4th Cir. 1968).

The constitutional right to a speedy trial applies to both the pre-charge stage (the time between detainer and trial) and the post-charge stage (the time between information or indictment and trial). *Keller vs. United States*, 238 F. 2d 259 (Ct. App. D.C.

1956); *People vs. Winfrey*, supra. A demand by an out-of-state prisoner is unnecessary to the attachment, preservation or perfection of that right. The right therefore is not waived by silence or inaction on the part of the accused, in prison out of state.

Nor is it necessary that the accused must show actual prejudice by the delay. In *Klopfers vs. North Carolina*, 386 U.S. 213 (1967), the Court made no reference to any factor caused by the delay which might prejudice Klopfer's defense. Nor do the circumstances of Klopfer suggest any prejudice which might occur. Rather, the finding that the delay denies Klopfer his right to a speedy trial stems solely from the oppression caused by the prosecutor's power to delay trial and the anxiety and concern associated with a public criminal charge.

Where the delay is substantial, prejudice is presumed. As stated in *Commonwealth vs. Green*, 234 N.E. 2d 534 (Mass. 1968):

Under the \* \* \* mandate of the Sixth Amendment of the Constitution of the United States, it has been held that prejudice need not be affirmatively shown.

See also *United States vs. Lustman*, 258 F. 2d 475, 477-78 (2nd Cir.); *Commonwealth vs. Hanley* 337 Mass. 384, 387, 149 N.E. 2d 608, 66 A.L.R. 2d 222; *United States vs. Simmons*, 338 F. 2d 804, 808 (2nd Cir.); *United States vs. Chase*, supra; *Bishop vs. Commonwealth*, 352 Mass. 258, 225 N.E. 2d 345; *People vs. Winfrey*, supra; *Pitts vs. North Carolina*, supra.

If prejudice were necessary, one need not look for it in this case. The effects of incarceration without prospects of parole, without the possibility of concurrent sentences, without the opportunity of participating in prison-earning programs that would permit restitution and withdrawal of charges, without numerous other prison privileges that are subject to custodial restrictions of detainees, plus the deleterious psychological effect on rehabilitation and personal reformatory efforts because of impending warrants or detainees—the effects of all these restrictions are prejudicial enough, even without considering the effect of the delay on the accused's right to a meaningful day in court on the merits of the case. In *State vs. Johnson*, 231 N.E. 2d 353 (Ct. Comm. Pl. Ohio 1967), the court succinctly pointed out the inherently prejudicial aspects of delay with reference to an out-of-state prisoner:

The Founders of Our State and Nation considered the right to a speedy trial so basic to justice they enshrined it in our Constitution. Certainly there is merit to the truism that justice delayed is justice denied. Anyone who has sat on a trial bench is acutely aware of the fact that the longer the day of trial is delayed after the event, the more difficult, if not impossible, it becomes to ascertain the truth. Not only do witnesses disappear, but testimony becomes "pat" and the detailed recollections so vital to a determination of credibility and to effective examination and cross-examination is gone.

Furthermore, to permit prosecuting authorities to delay the prosecution of a pending charge is to permit them to interfere with responsibilities vested in the corrective authorities and parole boards. It is the latter's duty to so design the prisoner's program that when, as he inevitably will [be], the prisoner is released, hopefully he will become a constructive member of society. It is also their duty, since most jurisdictions have indeterminate sentences, to decide when the prisoner should be paroled. All this is thwarted when detainers or warrants are filed and outstanding charges hang over the prisoner's head. This evil has been recognized by many courts.

### C. THE WINFREY, PITTS, SHANK, AND SMITH CASES

Four recent cases decided after *Klopfer* are peculiarly appropriate to the resolution of the issue in this case. While some involve greater delays than that endured by the Defendant in this case, all involve detainers or warrants against out-of-state convicts, are similar in many factual details, and contain a thorough analysis of the right to a speedy trial under federal standards.

1. In *People vs. Winfrey*, *supra*, a motion to dismiss a New York charge against an Alabama convict was granted by the trial court, reversed by an intermediate court, and granted upon appeal to the New York State Supreme Court. The people offered as justification for delay the fact that Winfrey was imprisoned in Alabama. In quickly disposing of this argument the Court noted that Nassau County, New York, authorities failed to take any steps to secure the release of the defendant and his return to New York for trial, either before or

after the indictment in New York. The people further argued that a request to Alabama for the prisoner would have been dubious in result. The Court noted that while Alabama was not a party to the Uniform Agreement on Detainers, Alabama did make provision for transfer of defendants to other states in the discretion of the Governor. The Court stated:

It is, moreover, a relatively simple matter to request the Governor of a Sister State to turn over a prisoner; and there is no contention that if such a request is made and rejected a delay in bringing the prisoner to trial in New York occasioned by his foreign imprisonment would be unreasonable. The point is that in this case no effort of any kind was made; consequently, the People have failed to establish good cause. \* \* \*

In reaching the heart of the issue itself, that the constitutional right to a speedy trial was violated, the Court stated as follows:

From a constitutional aspect, it appears that the delay in prosecuting defendant prior to his indictment, but after the initiation of criminal proceedings (by detainer), deprived him of due process of law. \* \* \* It may be that this doctrine has now been incorporated in the "speedy trial" guarantee of the Sixth Amendment pursuant to the *Klopfer* trial rule; but it is only of limited analytical importance whether the right is one of a "speedy trial" or of "due process of law". In either event, this delay \* \* \* which is unjustified and is explained only by defendant's imprisonment in Alabama, is unreasonable, since no effort was made to secure the defendant's release or transfer. \* \* \*

Merely mechanical distinctions are not involved. There is no proper criminological purpose served in holding several prosecutions over a defendant's head. Once having instituted the prosecution by [serving a] detainer or warrant \* \* \* [there is not] a reasonable ground for delay. Refusal by another jurisdiction to surrender the defendant would, of course, be an excuse. All the People would have to do is make the request, sincerely, for the surrender—a letter would do.

2. In *Pitts vs. North Carolina*, supra, the prisoner served a sentence in South Carolina and was then transferred to North

Carolina to face a detainer which had been lodged against him several years before. He was convicted in North Carolina, received another lengthy sentence and did not appeal his conviction; he did, however, subsequently file a petition for writ of habeas corpus in the Federal District Court. The petition was denied on the grounds that Pitts had failed to show prejudice by the delay. The Fourth Circuit Court of Appeals reversed and ordered Pitts' release. In the opinion by Judge Sobeloaf, the Court reviewed the law applicable to the constitutional right to a speedy trial. The Court noted the often-used rationale for justifying delay on grounds of sovereignty, and disposed of this rationale as follows:

The attempted justification for the State's failure for so long to bring Pitts to trial is that a defendant imprisoned in another jurisdiction has no right to a prompt hearing. This view, once entertained by some federal and state courts, was founded on the inability of one jurisdiction to require another as a matter of right to relinquish custody of a prisoner wanted for trial. \* \* \* The dubious theory appears to have been that since a request for custody might not be honored, the prosecutors have no obligation to make the request in the first place. As one commentator observed over a decade ago: "In the past, this denial (of a right to a speedy trial) may have been justified in view of the legal uncertainties of extradition and the difficulties of travel and communications. But these problems have largely disappeared". Note: 57 Colum. L. Rev. 846, 865 (1957).

In recent years, a rapidly expanding number of state and federal cases have produced a clear trend rejecting this doctrine and demanding a showing of due diligence by prosecutors to secure the presence for trial in their own jurisdiction[s] of an accused imprisoned or held for a substantial period in another jurisdiction. \* \* \*

Similarly in cases involving sister states, courts have found it constitutionally necessary for prosecutors to make reasonable efforts to extradite for speedy trial prisoners held in another state. \* \* \* These courts reason that since most state executives have discretionary power upon request of another sovereignty to release a prisoner for a purpose of trial, state prosecutors are under a duty to seek a temporary conditional release in an attempt to

bring the defendant promptly to trial. Recognizing that denial of the request by the imprisoning state would constitute a valid excuse for delay in the demanding state, these cases insist upon at least a good faith-effort by the prosecutors. \* \* \*

3. The third case, *Colorado vs. Shank* (1968), has specific applicability to the instant case. In *Shank*, the Denver District Court, in granting the defendant's motion to dismiss, ruled that the District Attorney must sincerely attempt to bring a defendant to trial even though he is confined in a penitentiary in another state, even though he (the District Attorney) anticipates difficulty in securing the right to extradition from the imprisoning state, and even though there is no demand on the accused's part. The court pointed out that Colorado and Nebraska (the imprisoning state) are geographical sister states and that little expense, time and inconvenience would have been involved in exercising due diligence to request the temporary extradition from the Governor of Nebraska.

4. In *Smith vs. Hooley*, 393 U.S. 374 (1969), an even more recent case to which the defendant has had but limited access, the United States Supreme Court held that an accused imprisoned by his own jurisdiction did not *ipso facto* forfeit his right (i.e., his constitutional right) to a speedy trial in another jurisdiction. Many courts (e.g., the Colorado Supreme Court) have adopted this decision.

#### D. CONCLUSION

The delay or inaction since the defendant has been incarcerated in the Nebraska Penal and Correctional Complex at Lincoln, Nebraska, is without justification in this case. Little expense, time and inconvenience would have been involved in affording the defendant a right to a speedy trial by requesting the Governor of Nebraska to allow his temporary extradition. At least since August, 1969, when the Prosecuting Attorney had actual knowledge of the defendant's incarceration in the Nebraska Penal Complex and in view of his correspondence with the defendant, timely efforts should have been made for transferring him to Eastern District of Illinois for purpose of prosecution. The right to a speedy trial is granted to everyone ever accused; a convict is no exception. In fact, the mere existence of the detainer during the period of delay is prejudicial, re-

strictive and punitive, giving the jurisdiction which issues the detainer or warrant a *de facto* power of punishment over the accused in advance of prosecution and in spite of possible acquittal on the charge.

The true measure of the dimension of the right to a speedy trial is its applicability to the most ostensibly undeserving defendant in the most insignificant case. The defendant in this case is far from undeserving and this case is far from insignificant to him. It is therefore respectfully requested that the defendant's Motion to Dismiss be granted.

Respectfully submitted,

(S) A. WENDELL WHEADON,  
*Attorney for Defendant,*  
*Welch, Wheadon & McCaskill,*  
*Attorneys at Law,*  
*310 N. 10th St., Suite 100,*  
*East St. Louis, Illinois 62201.*

[Proof of service omitted in printing]

In the United States District Court for the Eastern  
 District of Illinois

Document No. 16

Criminal No. 70-44

Section 2312, Title 18, United States Code

UNITED STATES OF AMERICA, PLAINTIFF

v.

CLARENCE EUGENE STRUNK, AKA, ALBERT GARDNER WAGNER,  
 DEFENDANT

*Answer to Defendant's Motion To Dismiss Indictment for  
 Failure To Prosecute—Filed March 8, 1971*

Now comes Henry A. Schwarz, United States Attorney for the Eastern District of Illinois, by Ronald A. Lebowitz, Assistant United States Attorney, who moves that the defendant's motion to dismiss the indictment in the above styled case on grounds of failure to prosecute and bring defendant to a speedy trial be denied for the following reasons:

1. The incident in question occurred on or about June 30, 1969.

2. Investigation on the case was initiated by the Federal Bureau of Investigation, predicated upon the discovery of the vehicle in question in Mt. Vernon, Illinois on or about July 12, 1969.

3. The defendant was arrested and held in custody in Nebraska on a state charge of burglary on July 24, 1969.

4. On a plea of guilty to the reduced charge of grand larceny in state court, the defendant was sentenced from 1-3 years in the state penitentiary on September 16, 1969.

5. On September 3, 1969 the defendant was interviewed by agents of the Federal Bureau of Investigation at Box Butte County Courthouse, Nebraska.

6. On October 20, 1969, the case report of the Federal Bureau of Investigation was filed in Springfield, Illinois.

7. On or about the 17th of December, 1969, the United States Attorney for the Eastern District of Illinois received correspondence from both the Federal Bureau of Investigation and the United States Attorney for the District of Nebraska that the defendant desired to enter a plea to the charge under Rule 20, Federal Rules of Criminal Procedure.

8. On or about December 18, 1969, Jeffrey F. Arbetman, Assistant United States Attorney for the Eastern District of Illinois, mailed the following items to the office of the United States Attorney, District of Nebraska:

- a. Transfer notice
- b. Waiver of Indictment forms
- c. Consent to Plead under Rule 20 forms
- d. Proposed informations

9. On or about March 18, 1970, the United States Attorney for the Eastern District of Illinois advised the Federal Bureau of Investigation that he considered presenting the matter to the Grand Jury. He advised that he would further await some acknowledgement from the United States Attorney in Nebraska to ascertain if the return of an indictment was necessary.

10. On May 26, 1970, after no correspondence concerning the defendant's prior request to enter a plea under Rule 20 was received from Nebraska, the United States Attorney for the Eastern District of Illinois presented this matter to the Grand Jury and an indictment was returned.

11. On August 13, 1970, a letter was received from the United States Attorney, District of Nebraska, stating that the defendant definitely refused to enter a plea under Rule 20 and that the defendant intended to raise the issue of speedy trial.

12. On August 24, 1969, the United States Attorney's Office, District of Nebraska received a letter from the defendant. The defendant acknowledged receipt of notification of transfer to the Eastern District of Illinois and wished to discuss the matter, expressing a lack of understanding as to the meaning of the notice. The letter referred to his being interviewed by the Federal Bureau of Investigation, and states that timeliness seems to be lacking.

13. On February 16, 1971, a Writ of Habeas Corpus ad Prosequendum for the production and delivery of the defendant was filed in the Eastern District of Illinois.

14. The Government alleges that the indictment in the above case was returned well within the Statute of Limitations.

15. In order to sustain the issue of speedy trial, it must be shown that any delay must be purposeful or oppressive. *Pollard vs. United States*, 352 U.S. 354, 361 *United States vs. Ewell*, 383 U.S. 116, 120. The defendant has failed to make such a showing.

16. To preserve the issue of speedy trial, the defense must file a demand for the same. In fact, the defendant in the first instance demanded not a speedy trial but requested to enter a plea of guilty under Rule 20. It was not until 8 months later that it was definitely ascertained that the defendant refused to enter such a plea. The Government denies that the defendant's reference to timeliness in advancing the charge in the letter to the United States Attorney, referred to above, amounts to a motion for a speedy trial, and the record does not reflect any motion filed by the defendant with the court.

17. In the case of *United States vs. Deloney*, 398 F 2d 324 (7 Cir.), the court held that the Statute of Limitations is not the exclusive test of whether preindictment delay is so prejudicial to the defendant as to warrant dismissal of prosecution. (Rule 48b, Federal Rules of Criminal Procedure). The Government contends that the defendant must show something else other than mere time to establish prejudice. The defendant has failed to do so.

18. In the case of *United States vs. Lee*, 413 F 2d 910 (7 Cir.) where the indictment in the cause followed the incident in

question by 21 months, where the defendant claimed that two of his witnesses had deceased in the interim, but where their deaths were not alleged in pretrial motions, the court ruled that the pretrial motion failed to show prejudice that was sufficient to require dismissal of the indictment, and that the accused had failed to prove that delay prejudiced his case.

19. In no way has the defendant prior to, or in the body of the present motion shown how he has been prejudiced by the period of time that has elapsed, a period of time that was partially due to the defendant's own request.

WHEREFORE, for all of the above reasons, the Government respectfully moves that the defendant's motion be denied.

Respectfully submitted,

HENRY A. SCHWARZ,  
*United States Attorney,*  
 (S) By RONALD A. LEBOWITZ,  
*Assistant United States Attorney.*

In the United States Court of Appeals for the Seventh Circuit  
 September Term, 1971

April Session, 1972

No. 71-1466

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

*v.*

CLARENCE EUGENE STRUNK, a/k/a ALBERT GARDNER WAGNER,  
 DEFENDANT-APPELLANT

*Appeal from the United States District Court for the Eastern  
 District of Illinois*

No. 70-44

WILLIAM G. JUERGENS, *Judge*

Argued May 30, 1972—Decided August 16, 1972

Before SWYGERT, *Chief Judge*, STEVENS and SPRECHER,  
*Circuit Judges.*

SWYGERT, *Chief Judge.* At the conclusion of a one-day jury trial, appellant-defendant Clarence Eugene Strunk was found

guilty of transporting on July 1, 1969 a stolen Oldsmobile station wagon from Oconomowoc, Wisconsin to Mount Vernon, Illinois in violation of 18 U.S.C. § 2312. The defendant was given a five-year sentence to run concurrently with one that he was then serving in the Nebraska State Penitentiary. The defendant appeals from his conviction alleging as the single ground for reversal the denial of his constitutional right of a speedy trial.

The following is a narration of the pertinent facts. On July 24, 1969 the defendant was arrested and held in custody of state authorities in Nebraska on a charge of burglary. On a plea of guilty to a reduced charge of grand larceny in a Nebraska state court, a sentence of one of three years was imposed.

While in custody of the state authorities the defendant was interviewed on September 3, 1969 by an agent of the Federal Bureau of Investigation. After receiving Miranda warnings, the defendant discussed with the agent the facts relating to the transportation of the car which is the subject matter of the instant prosecution. The defendant advised the agent that it was defendant's intention to "demand a speedy trial under Rule 20; and that was why he wanted to get this case cleaned up at the time I talked to him."

According to the record, "the case report of the Federal Bureau of Investigation was filed in Springfield, Illinois" on October 20, 1969, and on December 17 the United States Attorney for the Eastern District of Illinois received correspondence from the United States Attorney for the District of Nebraska which indicated that the defendant "desired to enter a plea to the charge under Rule 20, Federal Rules of Criminal Procedure." On the following day, the federal prosecutor sent the requested forms to Nebraska for processing the case under the rule.

Not having received any word whether the case would proceed under Rule 20 in the Nebraska district, the United States Attorney for the Eastern District of Illinois presented the matter to a grand jury in the latter part of May 1970. An indictment was returned on May 26.

Next the record reveals that on August 13, 1970 the United States Attorney for the District of Nebraska wrote his counterpart in Illinois that the defendant "definitely refused to enter a plea under Rule 20 and that the defendant definitely intended to raise the issue of speedy trial." Thereafter nothing happened until February 9, 1971, when the defendant, having been

brought to East St. Louis on a writ of habeas corpus ad prosequendam, was arraigned in the district court for the Eastern District of Illinois. At the arraignment, counsel was appointed for the defendant, and, after a not guilty plea, the trial was set for March 29, 1971.

Prior to the trial, defendant's counsel moved for a dismissal of the indictment pursuant to FED. R. CRIM. P. 48(b), asserting that the defendant has been denied a speedy trial as guaranteed by the sixth amendment. Briefs were filed by the parties, and the district judge, after hearing oral argument but without conducting an evidentiary hearing, denied the motion.

Approximately eleven months elapsed between the commission of the crime and the return of the indictment. The defendant, however, raises no issue with regard to the preindictment delay. He concedes that *United States v. Marion*, 404 U.S. 307 (1971), forecloses consideration of that issue in his case. The issue he does raise concerns the Government's delay in bringing him to trial after the return of the indictment. The time elapsing between the filing of the charge and the trial was 306 days, or approximately ten months. The defendant contends that when all the circumstances are considered he was not offered a speedy trial and that the district judge erred in not dismissing the indictment.

Initially, it must be observed that the record is scanty on the issue before us. No voir dire evidentiary hearing was conducted. Most of the facts must be gleaned from the docket entries and the briefs filed in the district court in support of and in opposition to the motion to dismiss. Nevertheless, while we considered remanding for an evidentiary hearing, we have concluded that the issue can be decided based upon the record before us and the oral argument. We do, however, emphasize that the better practice would be for the district court to conduct an evidentiary hearing upon a motion under Rule 48(b), and to make findings in ruling on the motion.

Recently, the Supreme Court in *Barker v. Wingo*, 40 U.S.L.W. 4840 (U.S. June 20, 1972), had occasion to speak at length on the exact question before us. After acknowledging the uncertainty which courts experience in protecting the right of a speedy trial, the Court nevertheless rejected as overrigid two approaches urged upon it as a means of clarifying the issues. One approach was that a trial be offered the defendant within a specified time. On that point Mr. Justice Powell

said, "[W]e can find no constitutional basis for holding that the speedy trial right can be quantified into a specified number of days or months." 40 U.S.L.W. at 4843.

The second approach relates to what is designated the "demand-waiver" doctrine, which "provides that a defendant waives any consideration of his right to a speedy trial for any period to which he has not demanded a trial." 40 U.S.L.W. at 4844. After indicating that the waiver of the right to a speedy trial should be gauged with the same severity as is the waiver of other fundamental rights guaranteed by the Constitution, the Court found the demand-waiver doctrine unacceptable, saying, "We think the better rule is that the defendant's assertion of or failure to assert his right to a speedy trial is one of the factors to be considered in an inquiry into the deprivation of the right." 40 U.S.L.W. at 4845.

As an alternative of the two rejected approaches—a fixed-time rule and the demand-waiver doctrine—the Court adopted a "balancing test" whereby the conduct of both the prosecutor and the defendant are weighed. Among the factors that courts should consider in applying the test, four were specifically identified: length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant. Mr. Justice Powell proceeded to elaborate some of the considerations which might be relevant in evaluating each factor. The Court stressed the fact that the balancing approach necessarily requires that each case be determined on an *ad hoc* basis.

Although *Wingo* was decided after this case was briefed and argued, we are obligated to follow its teachings and apply it to the record before us.

Although the length of delay in bringing the defendant to trial, ten months, might not be deemed inordinate in some cases (for example, a complicated multi-defendant prosecution) it is critical here in light of the simple nature of the case and the factors to which we shall refer. It should be stressed at the outset that while the time between arraignment and trial, February 9 to March 29, 1971, does not appear to be unreasonable, the time between indictment and arraignment, May 26, 1970 to February 9, 1971 is unusual and calls for explanation as well as justification.

The explanation offered by the Government for the delay in the arraignment is that until August 13, 1970 the United States Attorney was waiting for word from the defendant as to whether

he was going to proceed under Rule 20 in the Nebraska federal court. The Government argues it should not be charged for that period of the delay—seventy-nine days. The only excuse offered by the United States Attorney for the balance of the delay in setting the arraignment date is that his office was understaffed.

We do not accept either of these explanations. As to the first, it must be emphasized that the defendant did not have counsel until his arraignment. What he may have understood about Rule 20 without legal advice is a matter of conjecture, but it does appear that he misapprehended its requirement of a guilty plea before it may be invoked in the transferee court. This is evidenced by his statement to the FBI agent in September 1969 that he intended to "demand a speedy trial under Rule 20." Whatever the facts may have been, we do know that the United States Attorney, after sending the necessary papers for transferring the case under Rule 20 in December 1969 and not hearing further, decided to present the case to the grand jury in the latter part of May, 1970.\* We regard as extremely tenuous the United States Attorney's argument that he was still waiting for word from the defendant after May 26 in view of the fact that after he did hear from the defendant in August he made no move to set the arraignment date for six more months. Moreover, we summarily reject the additional reason advanced for the delay, the characterization of the United States Attorney's office as understaffed.

Although the defendant may have contributed to some of the delay in bringing the indictment by considering the invocation of Rule 20, he certainly contributed nothing to the delay thereafter. If his statements to the prosecution authorities mean anything, they indicate that rather than postponement he desired a speedy disposition of his case.

Appellant's counsel candidly admits that the delay in bringing the defendant to trial did not cause any prejudice with respect to the defense of the case. The prejudice lies, it is claimed, in delaying the commencement of his federal sentence. Since the sentence he received, the maximum term of five years, was to run concurrently with the one-to three-year sentence he was serving in the Nebraska State Penitentiary, defendant argues

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\*In addition, there is nothing in the record to indicate that the defendant was ever notified of the indictment prior to the issuance of the writ of habeas corpus ad prosequendum.

that the delay deprived him of the possibility of crediting the 306 days between indictment and trial to both sentences. In other words, he argues that he received in effect the maximum sentence plus 306 days. His argument is weakened by the possibility that the sentencing court might have postponed commencement of his federal sentence until after he had served his state sentence. On the other hand, the Supreme Court addressed itself to this very problem in *Smith v. Hoey*, 393 U.S. 375 (1969). There the Court said:

Suffice it to remember that this constitutional guarantee has universally been thought essential to protect at least three basic demands of criminal justice in the Anglo-American legal system: "(1) to prevent undue and oppressive incarceration prior to trial. \* \* \*"

The Court then observed:

At first blush it might appear that a man already in prison under a lawful sentence is hardly in a position to suffer from "undue and oppressive incarceration prior to trial." But the fact is that delay in bringing such a person to trial on a pending charge may ultimately result in as much oppression as is suffered by one who is jailed without bail upon an untried charge. First, the possibility that the defendant already in prison might receive a sentence at least partially concurrent with the one he is serving may be forever lost if trial of the pending charge is postponed. 393 U.S. at 377.

After balancing the various factors outlined in *Wingo*, we conclude that the defendant was denied a speedy trial to his prejudice.

The remedy for a violation of this constitutional right has traditionally been the dismissal of the indictment or the vacation of the sentence. Perhaps the severity of that remedy has caused courts to be extremely hesitant in finding a failure to afford a speedy trial. Be that as it may, we know of no reason why less drastic relief may not be granted in appropriate cases. Here no question is raised about the sufficiency of evidence showing defendant's guilt, and, as we have said, he makes no claim of having been prejudiced in presenting his defense. In

these circumstances, the vacation of the sentence and a dismissal of the indictment would seem inappropriate. Rather, we think the proper remedy is to remand the case to the district court with direction to enter an order instructing the Attorney General to credit the defendant with the period of time elapsing between the return of the indictment and the date of the arraignment. FED. R. CRIM. P. 35 provides that the district court may correct an illegal sentence at any time. We choose to treat the sentence here imposed as illegal to the extent of the delay we have characterized as unreasonable.

The cause is remanded with direction. The mandate shall be issued forthwith.

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In the United States Court of Appeals for the Seventh Circuit

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August 16, 1972

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

CLARENCE EUGENE STRUNK, AKA, ALBERT GARDNER WAGNER,  
DEFENDANT-APPELLANT

*Appeal from the United States District Court for the  
Eastern District of Illinois*

Before Hon. LUTHER M. SWYGERT, Chief Judge,  
Hon. JOHN PAUL STEVENS, Circuit Judge,  
Hon. ROBERT A. SPRECHER, Circuit Judge

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Illinois, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, REMANDED, with directions, in accordance with the opinion of this Court filed this day.

IT IS FURTHER ORDERED that the mandate of this Court issue forthwith.

In the District Court of the United States for the Eastern  
District of Illinois

Criminal No. 70-44

UNITED STATES OF AMERICA, PLAINTIFF

v.

CLARENCE EUGENE STRUNK, AKA, ALBERT GARDNER WAGNER,  
DEFENDANT

*Order on Remand—Filed August 29, 1972*

In accordance with the decision and mandate of the United States Court of Appeals for the Seventh Circuit issued August 16, 1972, No. 71-1466, and for the reasons set forth therein, IT IS ORDERED AND ADJUDGED that the Attorney General or his authorized representative credit the defendant, Clarence Eugene Strunk, a/k/a Albert Gardner Wagner, with the period of time elapsing between the return of the indictment and date of arraignment, a total of 259 days. This credit shall apply to the sentence of imprisonment for a period of five years heretofore imposed in the United States District Court for the Eastern District of Illinois at East St. Louis on May 4, 1972.

IT IS FURTHER ORDERED that the Clerk deliver a certified copy of this order to the United States Marshal and to the Attorney General.

JAMES L. FOREMA,  
*United States District Judge.*

In the United States Court of Appeals for the Seventh Circuit

September 7, 1972

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

CLARENCE EUGENE STRUNK, ETC., DEFENDANT-APPELLANT

*Appeal from the United States District Court for the Eastern  
District of Illinois*

Before Hon. LUTHER M. SWYGERT, *Chief Judge*, Hon. JOHN  
PAUL STEVENS, *Circuit Judge*, Hon. ROBERT A. SPRECHER,  
*Circuit Judge*

On consideration of the petition for rehearing filed in the  
above-entitled cause,

IT IS ORDERED that said petition for rehearing be and the  
same is hereby denied.

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In the Supreme Court of the United States

No. 72-5521

CLARENCE EUGENE STRUNK, PETITIONER

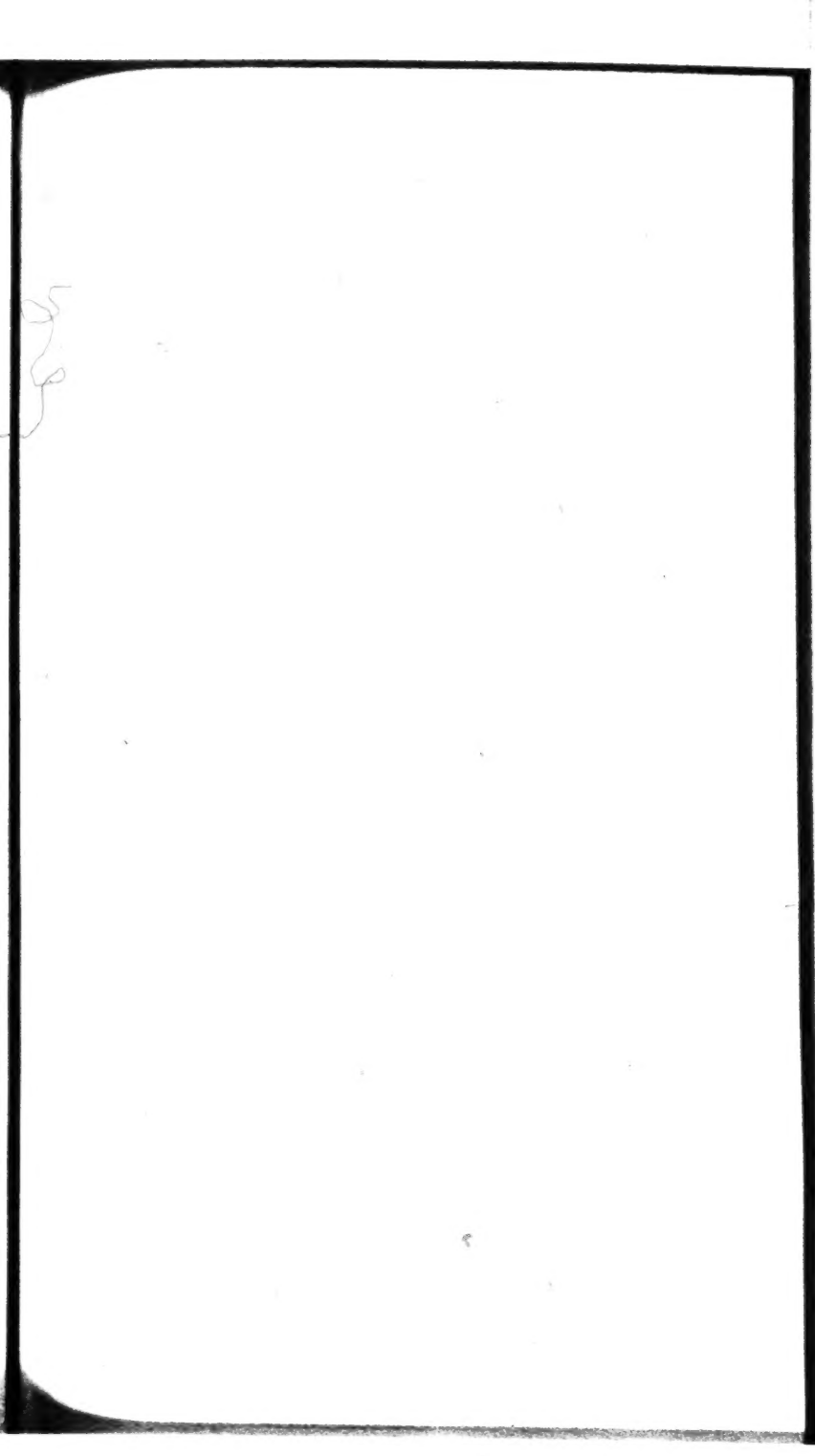
v.

UNITED STATES

*On petition for writ of Certiorari to the United States Court  
of Appeals for the Seventh Circuit*

On consideration of the motion for leave to proceed ~~herein~~  
in forma pauperis and of the petition for writ of certiorari, it is  
ordered by this Court that the motion to proceed in forma pau-  
peris be, and the same is hereby, granted; and that the petition  
for writ of certiorari be and the same is hereby, granted.

January 8, 1973.



**FILE COPY**

**FILED**

**MAR 16 1973**

**IN THE  
SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1972**

**MICHAEL RODAK, JR., CLERK**

**No. 72-5521**

**CLARENCE EUGENE STRUNK,**

*Petitioner,*

**v.**

**UNITED STATES,**

*Respondent.*

**ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE SEVENTH CIRCUIT**

**BRIEF FOR PETITIONER**

**OF COUNSEL:**

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(i)

## TABLE OF CONTENTS

	<u>Page</u>
OPINION BELOW .....	1
JURISDICTION .....	2
QUESTIONS PRESENTED .....	2
CONSTITUTIONAL PROVISION INVOLVED .....	2
STATEMENT .....	3
SUMMARY OF ARGUMENT .....	4
ARGUMENT:	
I. The Finding of a Denial of a Speedy Trial Is a Judicial Assertion That the Petitioner May Not Be Put to Trial on the Charge Against Him. The Petitioner, Having Been Found To Have Been Denied His Right to a Speedy Trial, Should Be Absolutely Discharged From His Sentence, for the Remedy of Absolute Discharge Is the Only Remedy That Effectively Protects the Individ- ual's Right to a Speedy Trial. ....	5
II. Absolute Discharge, While Effectively Protec- ting the Individual's Right to a Speedy Trial, Serves the Added Purpose of Protecting Societal Interests in the Right to a Speedy Trial. ....	15
CONCLUSION .....	19

## TABLE OF AUTHORITIES

### *Cases:*

Barker v. Wingo, 407 U.S. 514 (1972) .....	5, 15, 16
Beavers v. Haubert, 198 U.S. 77 (1905) .....	15, 17
Dickey v. Florida, 398 U.S. 30 (1970) .....	15, 16, 17
Klopper v. North Carolina, 386 U.S. 213 (1967) .....	13, 15

(ii)

Mann v. United States, 304 F.2d 394 (C.A. D.C., 1962) . . . . .	8, 9
Pollard v. United States, 352 U.S. 354 (1957) . . . . .	15
Ponzi v. Fessenden, 258 U.S. 254 (1922) . . . . .	18
Smith v. Hooey, 393 U.S. 374 (1969) . . . . .	11, 15, 16
United States v. Ewell, 383 U.S. 116 (1966) . . . . .	10, 15
United States v. Marion, 404 U.S. 307 (1971) . . . . .	10, 15
United States v. Rucker, 464 F.2d 823 (C.A. D.C., 1972) . . . .	10

*Miscellaneous:*

American Bar Association Project on Minimum Standards for Criminal Justice, <i>Standards Relating to Speedy Trial</i> , Approved Draft, 1968 . . . . .	8
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IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1972

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No. 72-5521

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CLARENCE EUGENE STRUNK,  
*Petitioner,*

v.

UNITED STATES,  
*Respondent.*

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ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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BRIEF FOR PETITIONER

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OPINION BELOW

No opinion was rendered by the United States District Court for the Eastern District of Illinois. The opinion of the United States Court of Appeals for the Seventh Circuit (App. 16) is reported at 467 F.2d 969.

## JURISDICTION

The judgment of the Court of Appeals was entered on August 16, 1972. Timely motion for rehearing was filed, and it was denied on September 7, 1972. The petition for writ of certiorari was filed on October 5, 1972, and certiorari was granted on January 8, 1973. This Court has jurisdiction under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

Whether a court, in reviewing a cause after trial, conviction, and sentence, and finding expressly that a defendant has been denied a speedy trial to his prejudice,

a. is required, under the principles of the Sixth Amendment to the Constitution of the United States, to discharge absolutely from his sentence a defendant so denied; or,

b. is required, under the principles of the Sixth Amendment to the Constitution of the United States, to reverse the conviction, vacate the sentence, and dismiss the indictment of a defendant so denied; or,

c. may engage a remedy, consistent with the principles of the Sixth Amendment to the Constitution of the United States, by which a defendant so denied is credited with the period of unreasonable delay, attributed to the prosecution, which originally gave rise to his denial of a speedy trial.

## CONSTITUTIONAL PROVISION INVOLVED

Constitution of the United States, Amendment VI:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to

be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

### STATEMENT

On May 26, 1970, the Petitioner was indicted on a count charging violation of 18 U.S.C. 2312, that is, the interstate transportation of a stolen motor vehicle with the knowledge that the motor vehicle was stolen (R. 1). At the time, the Petitioner was serving a sentence of one to three years in the Nebraska State Penitentiary on an unrelated charge (App. 14).

On January 26, 1971, a notice of arraignment and a writ of habeas corpus ad prosequendum were issued by the district court (R. 3). It appears that the Petitioner was not notified of the indictment prior to the issuance of the writ of habeas corpus ad prosequendum (App. 20).

The Petitioner was arraigned on February 9, 1971, and he entered a plea of not guilty (Tr. Arraignment, 3). Trial was set for March 29, 1971.

On February 19, 1971, the Petitioner filed a motion to dismiss the indictment on the ground that he had been denied a speedy trial (App. 1). The motion was heard on March 18, 1971, and it was denied.

Trial by jury was had on March 29, 1971, and the Petitioner was found guilty as charged (R. 18).

On May 4, 1971, the Petitioner was sentenced to the custody of the Attorney General for a period of five years, the sentence imposed to run concurrently with the sentence then being served by the Petitioner in the Nebraska State Penitentiary.\*

\*The Document was marked in a court below as "21," and the aforesaid marking appears on the upper right hand corner of the document.

Appeal was taken and the Court of Appeals found that the Petitioner had been denied a speedy trial (App. 21). The Court of Appeals further found that the Petitioner did not claim to have been prejudiced in his defense (App. 21). The Court of Appeals remanded the case to the district court with direction to enter an order instructing the Attorney General to credit the Petitioner with the period of time elapsing between the return of his indictment and the date of his arraignment (App. 22).

An order, pursuant to the direction on remand, was entered by the district court on August 29, 1972 (App. 23).

Timely motion for rehearing was filed, and the motion was denied on September 7, 1972 (R. 00).

Petition for writ of certiorari was filed on October 5, 1972, and certiorari was granted on January 8, 1973 (App. 24).

### SUMMARY OF ARGUMENT

When the Court of Appeals reviewed the Petitioner's claim of denial of a speedy trial, it was reviewing the district court's denial of Petitioner's motion to dismiss his indictment. In applying a remedy upon finding that the Petitioner had been so denied, the Court of Appeals could not take into consideration the irrelevant facts of Petitioner's trial and guilt.

The remedy applied by the Court of Appeals cannot stand for it presumes the validity of Petitioner's trial, and that presumption is in contradiction of the court's finding of a violation of Petitioner's right to a speedy trial.

Petitioner, having been found to have been denied his right to a speedy trial, should be absolutely discharged from his sentence. While this remedy is admittedly severe,

it is the only remedy that effectively enforces the right to a speedy trial. The remedy is practical, for, while it maximally protects the individual's right, it does not demean societal interests in the right to a speedy trial.

## ARGUMENT

### I.

**THE FINDING OF A DENIAL OF A SPEEDY TRIAL IS A JUDICIAL ASSERTION THAT THE PETITIONER MAY NOT BE PUT TO TRIAL ON THE CHARGE AGAINST HIM. THE PETITIONER, HAVING BEEN FOUND TO HAVE BEEN DENIED HIS RIGHT TO A SPEEDY TRIAL, SHOULD BE ABSOLUTELY DISCHARGED FROM HIS SENTENCE, FOR THE REMEDY OF ABSOLUTE DISCHARGE IS THE ONLY REMEDY THAT EFFECTIVELY PROTECTS THE INDIVIDUAL'S RIGHT TO A SPEEDY TRIAL.**

- a. **The Positional Perspective of a Reviewing Court Is Limited to the Perspective of the Court Whose Ruling Is Under Review.**

In *Barker v. Wingo*, 407 U.S. 514 (1972), this Court enunciated the balancing test to be used by the lower courts in making the determination of whether an accused has been denied his right to a speedy trial. The factors to be weighed in the test are flexible factors, and the test "necessarily compels courts to approach speedy trial cases on an *ad hoc* basis." *Id.*, at 530.

The Court of Appeals below applied the balancing test and concluded that the Petitioner had been denied a speedy trial. The Petitioner submits that the finding means exactly what it says, and the effect of that finding should be that the Petitioner should not have been put to trial.

The issue of denial of a speedy trial is crystallized by a motion to dismiss the charge against an accused on the ground of denial of speedy trial. It is at that precise point in time that the facts to be weighed in the balancing test are sealed. It is for this reason that a retrospective fact analysis must be applied in determining the issue.

A district court, in finding a denial of a speedy trial under the balancing test, necessarily will have to conclude:

1. that the length of the delay complained of was relatively long in light of the nature of the crime charged;
2. that the delay was not attributable to the accused, but was attributable to the Government, and the Government could offer no acceptable reason for the delay;
3. that the accused had properly asserted his right and had not waived it; and,
4. that the accused was prejudiced in some form of recognized speedy trial prejudice.

Furthermore, a district court will have to keep in mind that the accused, pursuant to an entered plea of not guilty, is presumed innocent until proven guilty by due process of law.

When a Court of Appeals reviews a district court's denial of an accused's motion for dismissal of indictment for want of a speedy trial, the Court of Appeals must assume a positional perspective identical to that of the district court. It is, like the district court, bound to a retrospective fact analysis in making its determination. In applying the balancing test, the Court of Appeals must weigh the same facts that were available to the district

court.<sup>1</sup> It is only in this manner that a Court of Appeals can say that a district court was right or wrong in denying a motion to dismiss. At the same time, a Court of Appeals is bound to accept, for purposes of determining error in the denial of the motion, that the accused was presumed innocent at the time of his motion, that is, at the time he claimed he was constitutionally wronged.

**b. Absolute Discharge Is the Only Effective Remedy To Protect the Individual's Right to a Speedy Trial.**

Upon a finding of denial of speedy trial, a court can engage only one of three possible remedies—dismissal of the indictment without prejudice, dismissal of the indictment with prejudice, or absolute discharge.

A dismissal without prejudice is a meaningless remedy when a denial of speedy trial has been found. Following such a dismissal, the Government would be free to reindict the accused on the same charge. Reindictment on the same charge would simply permit the Government to do indirectly what it could not do directly. Under a circumstance of immediate reindictment, if the new indictment were attacked by means of a motion to dismiss for want of a speedy trial, such a motion could properly be denied under the balancing test because of a failure to show unreasonable delay.

A dismissal with prejudice is an incomplete remedy for denial of a speedy trial. Such a dismissal apparently would permit the Government to indict the accused on

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<sup>1</sup> If facts to weigh are lacking, a Court of Appeals will remand for further developments below. However, the Court of Appeals herein felt that it had sufficient data upon which to make a determination on the question of denial of speedy trial (App. 18).

an offense which should have been joined with the offense charged in the original indictment. The Government again could do indirectly what it could not do directly, and this would frustrate the guarantee of a right to a speedy trial, issues of fairness aside.

The third possible remedy for denial of the right is absolute discharge. It is the only effective remedy to protect the right of an individual. The American Bar Association Project on Minimum Standards for Criminal Justice, *Standards Relating to Speedy Trial* (Approved Draft, 1968), Section 4.1, at page 40, recommends absolute discharge as the remedy to be applied upon a finding of denial of the right. The remedy is effective because it implements the full force of a guarantee. Absolute discharge does not suffer the disabilities of dismissals with or without prejudice, for the remedy not only bars the charge in the indictment but all other charges required to be joined to that charge.

The dictum in *Mann v. United States*, 304 F.2d 394 (C.A. D.C., 1962), covered the subject of remedy. The court therein stated:

We accept appellant's premise that the constitutional right to a speedy trial is properly enforced by a dismissal of the charge when there has been prejudicial delay in bring (sic) the case to trial.<sup>4</sup>

\* \* \* We also agree that a dismissal based on a finding that the constitutional right to a speedy trial has been denied bars all further prosecution of the accused for the same offense. While there appears to be no express articulation of the rule in the reported decisions, it is the unspoken premise of all cases involving the Speedy Trial Clause.<sup>6</sup> *Id.*, at 396-397 (footnotes and cited cases omitted).

The *Mann* court deemed this a necessary rule, and it pointed out that the rule had to be implemented "if the

constitutional guarantee is not to be washed away in the dirty water of the first prosecution, leaving the government free to begin anew with clean hands." *Id.*, at 397. Absolute discharge perfects the rule in that it precludes reindictment on a charge incorporated in the original charge.

**c. The Court of Appeals Below, Having Lost Sight of Its Positional Perspective, Applied a Remedy Which the District Court Could Not Have Applied.**

The sole issue raised by the Petitioner in the Court of Appeals was whether he had been denied his right to a speedy trial. As the Court of Appeals put it: "The defendant contends that when all the circumstances are considered he was not offered a speedy trial and that the district judge erred in not dismissing the indictment." (App. 18). Given that issue, we must consider the positional perspective of the Court of Appeals with that issue before it.

Petitioner submits that the Court of Appeals, in reviewing the district court's denial of his motion to dismiss for want of a speedy trial, sat in the same position—no better, no worse—as the district court when the district court examined the merits of the motion. Like the district court, the Court of Appeals was bound to a retrospective fact analysis in determining whether the district court had erred in denying the motion. Acting in that capacity, the Court of Appeals found a denial of a speedy trial. Having so found, the effect was that the Court of Appeals reversed the district court's denial of the motion, for the conclusions of the respective courts were opposite.

Keeping in mind that the district court could have made the same finding as the Court of Appeals, Petitioner submits that the one thing that the district court could not have done was order the Petitioner to trial after finding that he had been denied a speedy trial. However, that is, in effect, what the Court of Appeals did.

**d. The Speedy Trial Clause Guarantees Equally  
Against all Forms of Recognized Speedy Trial  
Prejudice.**

The Court enunciated its recognition of the forms of prejudice that can exist within a speedy trial context in *United States v. Ewell*, 383 U.S. 116 (1966), where the Court stated:

This guarantee is an important safeguard to prevent undue and oppressive incarceration prior to trial, to minimize anxiety and concern accompanying public accusation and to limit the possibilities that long delay will impair the ability of an accused to defend himself. *Id.*, at 120.

While the Petitioner was not prejudiced in his defense, his cause did not fail, for the Court has stated that "the major evils protected against by the speedy trial guarantee exist quite apart from actual or possible prejudice to an accused's defense." *United States v. Marion*, 404 U.S. 307, 320 (1971).

The Petitioner suffered that specific form of prejudice which can attach to an accused who, at the time of his indictment, is already a prisoner under sentence on an unrelated charge. The Petitioner suffered from undue and oppressive incarceration prior to trial, as that form of prejudice applies to prisoner-accuseds,<sup>2</sup> and as it was

<sup>2</sup>This same form of prejudice was the crucial factor in finding a denial of a speedy trial in *United States v. Rucker*, 464 F.2d 823 (C.A. D.C., 1972).

recognized in *Smith v. Hooey*, 393 U.S. 374 (1969), where the Court observed:

At first blush it might appear that a man already in prison under a lawful sentence is hardly in a position to suffer from "undue and oppressive incarceration prior to trial." But the fact is that delay in bringing such a person to trial on a pending charge may ultimately result in as much oppression as is suffered by one who is jailed without bail upon an untried charge. First, the possibility that the defendant already in prison might receive a sentence at least partially concurrent with the one he is serving may be forever lost if trial on the pending charge is postponed.<sup>7</sup> *Id.*, at 378 (footnote omitted).

At the time of his federal indictment, the Petitioner had already served approximately six and one-half months of a one to three year sentence imposed in Nebraska on an unrelated charge. It is not difficult to imagine his anxiety with the passing of each day as he awaited trial on the federal charge against him. For as each day passed, another day of possible concurrent time seemed lost. An added travesty was noted by the Court of Appeals in that the Petitioner was not notified of the indictment prior to the issuance of the writ of habeas corpus ad prosequendum. (App. 20) That writ was issued fourteen days before the Petitioner's arraignment.

**e. The Facts of an Accused's Trial and Guilt Are Irrelevant Facts in the Process of Determining the Remedy To Be Applied Upon a Finding of Denial of a Speedy Trial.**

In view of the finding of the Court of Appeals, there can be no doubt that the district court's denial of Petitioner's motion to dismiss the indictment was erroneous. Despite the finding of error, the Court of Appeals

did not absolutely discharge the Petitioner, but, instead, it engaged a remedy that is an anomaly in speedy trial cases. The remedy applied reflected the court's confusion with respect to its positional perspective.

While the Court of Appeals found that Petitioner had been denied a speedy trial, it faced three other facts—the Petitioner had been tried, was not prejudiced in his defense, and was found guilty by a jury. Petitioner submits that, had the court remembered its positional perspective and kept in mind that it had made its finding by retrospective fact analysis, it was obliged to ignore the irrelevant facts of trial and guilt.

The finding of a denial of a speedy trial was unique for the Court of Appeals, for it was the first time in its history that it had so found. There was no line of earlier appellate cases in the Seventh Circuit to which the court could turn for guidance. So the Court of Appeals attempted to do what was fair. And fair was the remedy it applied, but only at first blush.

While the Court of Appeals recognized that the traditional remedy was to dismiss the indictment or vacate the sentence, the Court of Appeals stated:

... we know of no reason why less drastic relief may not be granted in appropriate cases. Here no question is raised about the sufficiency of evidence showing defendant's guilt, and, as we have said, he makes no claim of having been prejudiced in presenting his defense. (App. 21).

And so the court decided that the proper remedy was to give back to the Petitioner what the Government, by its unreasonable delay in bringing him to trial, had taken away—259 days. The remedy was clearly compensatory, but, just as clearly, it was wrong.

The Court of Appeals overlooked the fact that it was reviewing the district court's denial of Petitioner's motion to dismiss the indictment for want of a speedy trial, which motion had been properly placed before the district court after the Petitioner had entered a plea of not guilty. The Court of Appeals sat as the district court, confronted by an accused who was presumed innocent until proven guilty according to due process of law. This was the positional perspective that the Court of Appeals was obliged to take in reviewing a pre-trial ruling of a court below it.

The remedy applied by the Court of Appeals is astonishing when we keep in mind the positional perspective of the court, for, if the remedy it applied is correct, the district court could have applied the same remedy with equal correctness in the first instance. But this will not pass the test of reason, for the remedy says, in effect, that the Petitioner, a man presumed innocent at the time of his motion to dismiss, has been found to have been denied his right to a speedy trial, and, while his indictment should be dismissed by traditional standards, he must stand trial notwithstanding because of the likelihood of his guilt. The remedy ignores the fact that the right it found violated is "one of the most basic rights preserved by our Constitution." *Klopfer v. North Carolina*, 386 U.S. 213, 226 (1967). It also ignores the presumption of innocence. Thus, while seemingly fair, the price of the remedy is too great.

**f. A Compensatory Remedy Indirectly Encourages Government Delay and, If Permitted To Stand, Will Qualitatively Lessen the Speedy Trial Rights of Prisoner-Accuseds.**

An examination of the practical implications of the remedy applied below, to the extent that it permits a prisoner-defendant to be credited with the amount of unreasonable Government delay in bringing him to trial, reveals that the Government is not really charged with the duty of bringing a prisoner-accused to trial promptly. The remedy is too forgiving of carelessness, sloth, and negligence on the part of Government prosecutors. No accusation of sloth is being made herein. There seems little doubt that Government prosecutors labor under numerically heavy case loads. There are too few prosecutors and too few judges. This is society's failure of not furnishing adequate facilities and manpower to accomplish the effective administration of criminal justice.

Facing the prospect of prosecuting an accused who is already incarcerated on an unrelated charge and reasonably recognizing that such an accused may be losing the possibility of serving his sentences concurrently, the Government prosecutor has no imperative need to furnish such an accused with a speedy trial. The duty of diligence is replaced by work-load convenience, for a court will be able to credit the accused with the period of unreasonable delay in bringing him to trial after the accused's presumption of likelihood of guilt has been confirmed by a verdict of guilty.

Since prisoner-accuseds, pursuant to the remedy applied below, can eventually be made whole, it does not stretch the imagination or the ordinary evaluation of human nature to realize that Government prosecutors will give the lowest priority to the cases of prisoner-accuseds.

## II.

**ABSOLUTE DISCHARGE, WHILE EFFECTIVELY PROTECTING THE INDIVIDUAL'S RIGHT TO A SPEEDY TRIAL, SERVES THE ADDED PURPOSE OF PROTECTING SOCIETAL INTERESTS IN THE RIGHT TO A SPEEDY TRIAL.**

**a. The Right to a Speedy Trial Is a Fundamental Right and Has Been so Recognized by This Court**

The Supreme Court has directly addressed itself to the myriad issues that arise in speedy trial contexts only eight times prior hereto. *Beavers v. Haubert*, 198 U.S. 77 (1905); *Pollard v. United States*, 352 U.S. 354 (1957); *United States v. Ewell*, 383 U.S. 116 (1966); *Klopfers v. North Carolina*, 386 U.S. 213 (1967); *Smith v. Hooey*, 393 U.S. 374 (1969); *Dickey v. Florida*, 398 U.S. 30 (1970); *United States v. Marion*, 404 U.S. 307 (1971); and, *Barker v. Wingo*, 407 U.S. 514 (1972). Nevertheless, the Court has recognized and pronounced the right to a speedy trial to be "as fundamental as any of the rights secured by the Sixth Amendment." *Klopfers v. North Carolina*, 386 U.S. 213, 223.

In the *Klopfers* decision, the Court traced the historical basis and American acceptance and development of the right. In concluding its examination of the history of the right, the Court stated:

The history of the right to a speedy trial and its reception in this country clearly establish that it is one of the most basic rights preserved by our Constitution. *Id.*, at 226.

This Court has never deviated from its characterization of this right as being fundamental or basic, and its consistency in this respect is reflected in cases which

followed the *Klopfers* decision. Reference is so made in *Smith v. Hooey*, 393 U.S. 374, 375; *Dickey v. Florida*, 398 U.S. 30, 37; and, *Barker v. Wingo*, 407 U.S. 514, 515.

**b. This Court, in Earlier Decisions, Has Indirectly Recognized Absolute Discharge as the Remedy for Denial of the Right.**

Implicit in the Court's recognition of this fundamental right is the expectation that the remedy to be applied for a violation of the right will be of a quality commensurate with the right. While the Supreme Court has never specifically addressed itself to the issue of remedy for denial of the right, we can examine the decisions of the Court where it applied a remedy upon a finding of a denial of the right and where the Court has made comment on the subject of remedy.

While the decision in *Barker v. Wingo*, 407 U.S. 514, did not go to, or turn on, an issue of remedy, the Court, in reviewing the general nature of the right, pointed out:

The amorphous quality of the right also leads to the unsatisfactorily severe remedy of dismissal of the indictment when the right has been deprived. This is indeed a serious consequence because it means that a defendant who may be guilty of a serious crime will go free, without having been tried. Such a remedy is more serious than an exclusionary rule or a reversal for new trial,<sup>16</sup> but it is the only possible remedy. *Id.*, at 522 (footnote omitted).

In *Dickey v. Florida*, 398 U.S. 30, the Court reviewed the conviction of a defendant who claimed a denial of a speedy trial. The Court found that the defendant had been so denied, and, in applying a remedy, the Court reversed and remanded "with direction to vacate the

judgment appealed from and direct the dismissal of any proceeding arising out of the charges on which that judgment was based." *Id.*, at 38.

The *Dickey* decision represents the last case in which the Court found a denial of a speedy trial. While the Court did not explicitly so state, the remedy applied by the Court was, in effect, absolute discharge.

- c. Recognizing That Society Has an Interest in an Accused's Right to a Speedy Trial, the Interest of Society Can Only Be Effectively Protected by Applying the Remedy of Absolute Discharge When a Violation of the Right Has Been Judicially Determined.**

While the right to a speedy trial is usually thought of as an individual right, the right serves a broader function in that it "does not preclude the rights of public justice." *Beavers v. Haubert*, 198 U.S. 77, 87. As the Court pointed out in *Dickey v. Florida*, 398 U.S. 30:

The right to a speedy trial is not a theoretical or abstract right but one rooted in hard reality in the need to have charges promptly exposed. *Id.*, at 37.

Petitioner submits that the need for prompt exposition of charges is not an absolute necessity from every accused's point of view, but it is imperative for society in every case in which society brings charges against an accused.

While it is recognized that a defendant may be prejudiced in his defense because of delay in bringing him to trial, it should also be recognized that delay may also serve to prejudice the Government's case. If delay by the prosecution is encouraged, or at least condoned, by an ineffective remedy given to defendants denied speedy trials, then society stands to suffer most. As the Court observed:

Delay in the trial of accused persons greatly aids the guilty to escape because witnesses disappear, their memory becomes less accurate, and time lessens the vigor of officials charged with the duty of prosecution. *Ponzi v. Fessenden*, 258 U.S. 254, 264 (1922).

When delay is prolonged, an accused, who is under no obligation to offer a defense at trial, can simply observe the development of weakness in the Government's case and take an acquittal because the Government could not make out at a late date what might have been a strong case at an earlier time.

If prosecutors are aware that the severe remedy of absolute discharge will be applied in the event of a finding of a denial of speedy trial, that awareness alone will have the salutary effect of encouraging prosecutors to tolerate as little delay as possible in preparing and presenting their cases. Prompt trials will serve to eliminate serious claims of denial of speedy trials. Further, prompt trials will insure that the Government will be presenting its best case in each instance, with available and willing witnesses who will be possessed of accurate memories. The interests of society will thereby be best protected and not at the expense of compromising the individual's right.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals for the Seventh Circuit should be reversed with the direction that the Petitioner be absolutely discharged.

Respectfully submitted,

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February 20, 1973

# INDEX

	Page
Opinion below.....	1
Jurisdiction.....	1
Question presented.....	2
Constitutional provision involved.....	2
Statement.....	2
Argument.....	7
I. Introduction and summary.....	7
II. Even assuming an infringement of petitioner's Sixth Amendment right to a speedy trial, the relief accorded by the court of appeals was proper.....	13
Conclusion.....	25

## CITATIONS

### Cases:

<i>Alderman v. United States</i> , 394 U.S. 165.....	15
<i>Barker v. Wingo</i> , 407 U.S. 514.....	7,
8, 9, 12, 14, 17, 18, 20-21	
<i>Beavers v. Haubert</i> , 198 U.S. 77.....	8
<i>Brennan v. Arnheim and Neely, Inc.</i> , No. 71-1958, decided February 28, 1973.....	12
<i>Chapman v. California</i> , 386 U.S. 18.....	16
<i>Dickey v. Florida</i> , 398 U.S. 30.....	13, 14, 18, 20
<i>Feldman v. United States</i> , 322 U.S. 487.....	16
<i>Harris v. New York</i> , 401 U.S. 222.....	16
<i>Illinois v. Somerville</i> , No. 71-692, decided February 27, 1973.....	23
<i>Kastigar v. United States</i> , 406 U.S. 441.....	19
<i>Klopfer v. North Carolina</i> , 386 U.S. 213.....	11, 13
<i>Malloy v. Hogan</i> , 378 U.S. 1.....	1
<i>Mann v. United States</i> , 304 F. 2d 394.....	24
<i>Mapp v. Ohio</i> , 367 U.S. 643.....	15
<i>Miranda v. Arizona</i> , 384 U.S. 436.....	15

## Cases—Continued

<i>Murphy v. Waterfront Commission</i> , 378 U.S. 52.....	Page 16
<i>National Labor Relations Board v. Express Publishing Co.</i> , 312 U.S. 426.....	12
<i>Provoo, Petition of</i> , 17 F.R.D. 183, affirmed, 350 U.S. 857.....	13
<i>Pollard v. United States</i> , 352 U.S. 354.....	9
<i>Smith v. Hooey</i> , 393 U.S. 374.....	11
<i>United States v. Blue</i> , 384 U.S. 251.....	15
<i>United States v. Butler</i> , 426 F. 2d 1275.....	9
<i>United States v. Ewell</i> , 383 U.S. 116. 8, 11, 14, 17, 18	
<i>United States v. Mann</i> , 291 F. Supp. 268.....	13-14
<i>United States v. Marion</i> , 404 U.S. 307.....	9, 11, 23
<i>United States v. Tucker</i> , 404 U.S. 443.....	11
<i>Weeks v. United States</i> , 232 U.S. 383.....	15
<i>Wong Sun v. United States</i> , 371 U.S. 471.....	15
Constitution, statutes, and rules:	
United States Constitution:	
The Fourth Amendment.....	15
The Fifth Amendment.....	15, 16, 19, 23
The Sixth Amendment.....	2,
6, 7, 8, 12, 13, 15, 16, 20, 21, 22, 23	
Statutes:	
18 U.S.C. 2312.....	2
18 U.S.C. 3568.....	22
28 U.S.C. 2106.....	21
Federal Rules of Criminal Procedure:	
Rule 3.....	4
Rule 20.....	4, 5, 9-10
Rule 35.....	6
Rule 48(b).....	24
Rule 50(b).....	24
Miscellaneous:	
American Bar Association Project on Minimum Standards for Criminal Justice, <i>Speedy Trial</i> (Approved Draft 1968).....	24

# **In the Supreme Court of the United States**

OCTOBER TERM, 1972

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No. 72-5521

CLARENCE EUGENE STRUNK, PETITIONER

v.

UNITED STATES OF AMERICA

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*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE SEVENTH CIRCUIT*

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**BRIEF FOR THE UNITED STATES**

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## **OPINION BELOW**

The opinion of the court of appeals (App. 16-22) is reported at 467 F.2d 969.

## **JURISDICTION**

The judgment of the court of appeals (App. 22) was entered on August 16, 1972. On September 7, 1972, the court denied a petition for rehearing (App. 24). The petition for a writ of certiorari was filed on October 5, 1972; it was granted on January 8, 1973. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

### QUESTION PRESENTED

Whether the court of appeals, having concluded that petitioner was denied his constitutional right to a speedy trial because the ten-month delay in bringing him to trial prejudiced his ability to have that portion of his federal sentence run concurrently with his pre-existing state sentence, could properly fashion a remedy to cure the particular prejudice, by ordering credit on his federal sentence, rather than ordering the dismissal of the indictment.

### CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the Constitution provides in pertinent part:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial,

\* \* \*

### STATEMENT

Following a trial by jury in the United States District Court for the Eastern District of Illinois, petitioner was convicted of transporting a motor vehicle in interstate commerce, having knowledge that it was stolen, in violation of 18 U.S.C. 2312 (the Dyer Act). He was sentenced on May 4, 1971, to five years' imprisonment, the term to run concurrently with a one-to-three year sentence he was then serving in the Nebraska State Penal Complex for an unrelated state offense.<sup>1</sup> The court of appeals affirmed the conviction,

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<sup>1</sup> On July 24, 1969, petitioner was arrested by state authorities in Nebraska and held in custody on a charge of burglary. Following a guilty plea in the Nebraska state court to the reduced charge of grand larceny, he was sentenced in September 1969 to a one-to-three year prison term (App. 14).

but remanded to the district court with instructions that the sentence be modified by crediting petitioner with the nine-month period elapsing between the indictment and the arraignment (App. 16-22).

The material facts are essentially as set forth in the opinion below and are not here in dispute. On June 30, 1969, petitioner entered Steinman Motor Co., an automobile dealership in Oconomowoc, Wisconsin, and spoke with the owner and a sales manager about purchasing an Oldsmobile Cutlass station wagon. Upon being advised that petitioner had an injured leg and needed a hand-operated switch to dim the headlights, the salesmen suggested that petitioner examine one of the cars on the lot having a dimmer switch. Without permission, petitioner drove the car off the lot when no one was watching and did not return. The automobile was later found on July 11, 1969, parked in a Ford dealer's car lot in Mount Vernon, Illinois (Tr. 5-12, 33-36, 45-52, 67).<sup>2</sup>

Petitioner was interrogated about the stolen vehicle by F.B.I. Agent Kinsey on September 3, 1969, the day after he had been sentenced on his guilty plea in the Nebraska state court (n. 1, *supra*); at the time he was in the local jail in Alliance, Nebraska (Tr. 78-85). After being advised of his constitutional rights, petitioner signed a waiver form<sup>3</sup> and then admitted to Agent Kinsey that he had taken the car without permission and driven it from Wisconsin to Mount

<sup>2</sup> "Tr." references are to the transcript of the trial proceedings, a copy of which is on file with the Clerk of this Court.

<sup>3</sup> Petitioner used the alias "Albert Garner Wagner" when he signed the waiver form (Tr. 80).

Vernon, Illinois, where he had abandoned it near an automobile dealership (Tr. 82-83, 98-99). Petitioner also told the agent that "it was his intention to demand a speedy trial under Rule 20 in the District of Nebraska and that is why he wanted to get this case cleaned up \* \* \*" (Tr. 81).

Petitioner was not arrested, taken into federal custody, or made the object of a federal complaint under Rule 3, Fed. R. Crim. P. On December 17, 1969, the United States Attorney for the Eastern District of Illinois was advised by the Federal Bureau of Investigation and the United States Attorney for the District of Nebraska that petitioner wished to enter a plea of guilty or *nolo contendere* to a federal Dyer Act charge, pursuant to Rule 20, Fed. R. Crim. P. (App. 14).<sup>4</sup> Forms for waiving indictment and for consenting to plead under Rule 20 were then mailed, with other necessary papers, to the office of the United States Attorney in Nebraska, where petitioner was confined in the state prison (*ibid.*).

These forms were not returned, and on May 26, 1970, the United States Attorney for the Eastern District of Illinois, having received no further word with regard to the proposed plea under Rule 20, presented the case to the grand jury and the present indictment was returned (App. 14). Thereafter, on August 13,

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<sup>4</sup> Rule 20 authorizes the transfer of a case from a district in which a criminal charge is pending (whether or not an indictment or information has been filed) to be disposed of in another district where the defendant has been arrested or is being held, if the defendant states in writing that he wishes to plead guilty or *nolo contendere* and if the respective United States Attorneys consent.

1970, the Illinois prosecutor was informed by the United States Attorney in Nebraska that petitioner had refused to enter a plea under Rule 20 and had indicated he would raise the issue of a speedy trial (App. 15). The Nebraska office received a letter from petitioner eleven days later in which it was suggested that "timeliness in advancing the charge seems to be lacking" (*ibid.*).

On February 9, 1971, nine months after the return of the indictment, petitioner was brought to the United States District Court for the Eastern District of Illinois pursuant to a writ of habeas corpus *ad prosequendum* to be arraigned.<sup>5</sup> He entered a plea of not guilty and trial was set for March 29, 1971. Pretrial motions to dismiss the indictment because of insufficient evidence before the grand jury and because of failure to grant a speedy trial were denied after a hearing on March 18, 1971. At his trial, petitioner did not take the stand and presented no affirmative defense; he was convicted in a one-day trial on March 29, 1971.

The court of appeals affirmed the conviction, but it remanded the case to the district court with instructions to modify petitioner's sentence (App. 16-22). The remand order was based on the court's finding that the delay of 259 days between the time of indictment and the time of arraignment constituted, in the context of this particular case, a violation of peti-

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<sup>5</sup> No detainer had been filed against him by federal authorities prior to his trial, and the execution of the writ of habeas corpus was apparently the first time petitioner learned that he had actually been indicted (App. 15, 20).

tioner's right to a speedy trial under the Sixth Amendment. Petitioner conceded in the court of appeals "that the delay in bringing \* \* \* [him] to trial did not cause any prejudice with respect to the defense of the case" (App. 20). The sole prejudice claimed by petitioner lay "in delaying the commencement of his federal sentence," thereby depriving him of an opportunity to serve a greater portion of his federal sentence concurrently with the state sentence he was already serving (App. 20-21). The court of appeals concluded that petitioner had been unconstitutionally denied that opportunity; even though it termed the loss of this credit a denial of the Sixth Amendment right to a speedy trial, the court determined that relief "less drastic" than dismissal of the indictment was appropriate (App. 21-22). It therefore chose "to treat the sentence \* \* \* as illegal to the extent of the delay we have characterized as unreasonable" (App. 22). On remand, the district court was directed to enter an order, under Rule 35, Fed. R. Crim. P., "instructing the Attorney General to credit the defendant with the period of time elapsing between the return of the indictment and the date of the arraignment" (*ibid.*).<sup>6</sup> Petitioner contends in this Court that the court of appeals was obliged to order his complete discharge rather than a "compensatory" reduction of his sentence (Pet. Br. 12).

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<sup>6</sup> The district court subsequently ordered the Attorney General to give petitioner credit for 259 days on the sentence (App. 23).

## ARGUMENT

## ACTION AND SUMMARY

## I. INTRODUCTION

In its present posture, this case presents a novel issue that has not been addressed in earlier decisions—the permissible remedy for dealing with violations of the Sixth Amendment right to a speedy trial. The issue did not arise when it was generally assumed that the denial of a speedy trial was synonymous with unjust interference with the accused's ability to mount a defense. Under that traditional approach, a single remedy was naturally assumed to follow automatically—dismissal of the charges against the accused. With this Court's recent decision in *Barker v. Wingo*, 407 U.S. 514, however, announcing the application of a more flexible standard in evaluating speedy trial claims, the question raised here concerning the nature of the relief that can properly be accorded upon finding an infringement of this constitutional right has surfaced.

The court below, having reached the conclusion that the *Barker* criteria tipped the balance in petitioner's favor on the speedy trial issue, held that the traditional remedy of dismissal of the indictment—which this Court in *Barker* termed an “unsatisfactorily severe remedy” (407 U.S. at 522)—would be “inappropriate” (App. 22) in the particular circumstances of this case and instead ordered “less drastic relief” (App. 21). While the court's finding of a Sixth Amendment violation is, in our view, dubious on

this record, we do believe that, if that determination is accepted *arguendo*, the remedy fashioned by the court of appeals is a proper, proportioned response to the infringement it found to exist.

In this regard, it will aid our discussion of the "remedy" issue involved here if we first take a brief look at the nature of the alleged constitutional violation that prompted the questioned relief. The Sixth Amendment guarantee of a "speedy trial" is, as this Court pointed out in *Barker* (407 U.S. at 519), "generically different from any of the other rights enshrined in the Constitution for the protection of the accused." It is, as has been so often emphasized, "necessarily relative," securing rights to a defendant without precluding the rights of public justice. *Beavers v. Haubert*, 198 U.S. 77, 87; *United States v. Ewell*, 383 U.S. 116, 120. Because of the "amorphous quality" of this constitutional safeguard (*Barker v. Wingo*, *supra*, 407 U.S. at 522), the Court stressed in *Barker* (*ibid.*) that "any inquiry into a speedy trial claim necessitates a functional analysis of the right in the particular context of the case." Whether or not a Sixth Amendment violation has occurred turns on "a difficult and sensitive balancing process" (*id.* at 533) involving four related factors: "Length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant" (*id.* at 530).

Length of delay, of course, is the key criterion: "Until there is some delay which is presumptively prejudicial, there is no necessity for inquiring into the other factors that go into the balance." *Barker v. Wingo*, *supra*, 407 U.S. at 530. In the present case,

the length of the delay between indictment and trial was approximately ten months.<sup>7</sup> While such a period of inactivity would ordinarily not be sufficient to cause concern or to suggest "presumptive prejudice," it is relevant that this was a simple prosecution for interstate transportation of a stolen automobile. See *Barker v. Wingo, supra*, 407 U.S. at 531. On the other hand, this case was not one dependent upon eyewitness testimony or memories that might appreciably fade in a few months (compare *United States v. Butler*, 426 F. 2d 1275, 1277 (C.A. 1)); accordingly, the lapse of time here does not alone raise a presumption of a speedy trial violation. Nevertheless, the court below considered the delay sufficient to act as a "triggering mechanism" within the meaning of *Barker* necessitating inquiry into the other factors, for the simple reason that petitioner's state sentence was running all during the period the federal indictment remained untried.

No claim is made here that the prosecutor intentionally delayed petitioner's trial "to gain some tactical advantage over [him] or to harass him." *United States v. Marion*, 404 U.S. 307, 325; and see *Pollard v. United States*, 352 U.S. 354, 361. The United States Attorney in Illinois explained that he took no action for the first two and a half months after indictment because petitioner had indicated that he was going to enter a plea to the federal charge under Rule 20,

<sup>7</sup> The eleven-month interval between the commission of the crime and indictment is not challenged here (App. 18). See *United States v. Marion*, 404 U.S. 307. In addition, the court of appeals held that the one month delay between arraignment and trial was not unreasonable (App. 19).

Fed.R.Crim.P.; indeed, arrangements had already been made to permit him to do that in Nebraska (App. 19-20). When it became apparent that petitioner had decided against a Rule 20 plea, the failure to set an immediate date for arraignment was attributed to the fact that the office of the United States Attorney was at the time "understaffed" (App. 20); the limited work force and the need to use available manpower on active cases commanding a higher priority resulted in approximately six months' more delay before arraignment and an additional month before trial.

During this period, petitioner did object to the fact that his case was not being handled more expeditiously (App. 15). On this record, however, it cannot be determined whether he declined to press his objection by demanding a speedy trial in order not to lose the possible advantage of later using the government's delay to defeat his prosecution for a crime to which he had already confessed (*supra*, pp. 3-4).<sup>\*</sup> Since he was lawfully in prison for another offense, and was apparently unaware of the return of the federal indictment until removed from state custody for arraignment a month before trial, petitioner clearly did not share many of the concerns that often confront an accused awaiting trial. The delay did not "seriously interfere with [his] liberty \* \* \*, disrupt his employment, drain his financial resources, curtail his associations, subject him to

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<sup>\*</sup> The record does not reveal whether, prior to his arraignment on the federal charge, petitioner was in communication with counsel in Nebraska who represented him on the state charges.

public obloquy, [or] create anxiety in him, his family and his friends." *United States v. Marion, supra*, 404 U.S. at 320; and see *Klopfer v. North Carolina*, 386 U.S. 213, 221-226; *United States v. Ewell, supra*, 383 U.S. at 120. Nor was there any real likelihood in the circumstances of this case that a lapse of time would in any way prejudice his defense, and it has been conceded that there was no such prejudice (App. 20).

Indeed, petitioner's only interest in expeditious treatment was to receive an early sentence on the federal charge, which he hoped would be allowed to run concurrently with the state sentence he was already serving. But petitioner was not entitled to concurrent sentences as a matter of due process. The imposition of sentence following a conviction is within the broad discretion of the federal district judge. See *United States v. Tucker*, 404 U.S. 443, 446-447. As pointed out by the court below (App. 21), in the case at bar the sentencing court could "have postponed commencement of [petitioner's] federal sentence until after he had served his state sentence." The fact that it did not do so, moreover, but instead made the sentence partially concurrent with the sixteen months remaining on the one-to-three year sentence petitioner was then serving, might well have actually been designed to compensate him for his pre-trial confinement.\* It is therefore far from clear that

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\*This case does not present the situation referred to in *Smith v. Hooy*, 393 U.S. 374, 377, where the possibility of receiving at least a partially concurrent sentence is "forever lost" because of the inordinate delay in bringing the pending case to trial. Even in such circumstances, however, the alleged prejudice to the defendant is cured if the sentence imposed is

petitioner suffered prejudice of any sort as a result of the ten-months' delay between indictment and trial.<sup>10</sup>

The court of appeals thought otherwise. "After balancing the various factors outlined in [*Barker v. Wingo*]," it stated (App. 21), "we conclude that the defendant was denied a speedy trial to his prejudice." Even assuming *arguendo* that the court below struck the proper balance, we disagree with petitioner that the only possible remedy on such a finding in *these* circumstances is dismissal of the indictment. We believe that the courts can properly enforce the constitutional protection in this area, as they have in other areas, by tailoring the remedy to the particular infringement that needs to be cured. By modifying

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reduced by the sentencing judge by a length of time commensurate with that part of the already served sentence that the judge could have otherwise made to run concurrently.

<sup>10</sup> If this Court should conclude on a balance of the four factors in *Barker* that the present circumstances—an explained ten-months' delay resulting in virtually no prejudice to defendant—do not establish a speedy trial violation, we think it can properly affirm the judgment below. While such a disposition would necessarily leave standing the court of appeals' modification of sentence, the government has filed no cross-petition challenging that ruling. Compare, *Brennan v. Arnheim and Neely, Inc.*, No. 71-1598, decided February 28, 1973, slip op. 4-5; *National Labor Relations Board v. Express Publishing Co.*, 312 U.S. 426, 431. Petitioner would, of course, have no cause to object to the present sentence under the court of appeals' remand order if this Court affirmed on the ground that there was no Sixth Amendment violation here, since such a disposition of the case would leave him with more than he was legally entitled to.

petitioner's sentence in this case to credit him for the period that elapsed between indictment and arraignment, the court of appeals has, we submit, vindicated the interests both of society and of the accused that are served by the right to a speedy trial, without in any way compromising the effective enforcement of this "fundamental" right (*Klopper v. North Carolina, supra*, 386 U.S. at 223, 226) in this case or in future ones.

II. EVEN ASSUMING AN INFRINGEMENT OF PETITIONER'S SIXTH AMENDMENT RIGHT TO A SPEEDY TRIAL, THE RELIEF ACCORDED BY THE COURT OF APPEALS WAS PROPER

Traditionally the remedy associated with a violation of the constitutional right to a speedy trial has been dismissal of the indictment. In the context of what this and other federal courts have heretofore held to be an impermissible delay under the Sixth Amendment, such relief seems entirely appropriate. The constitutional infringement in past cases has essentially been based on a finding of undue prejudice to the defendant's ability to mount a defense, which either has been presumed because the inordinate lapse of time would necessarily have caused memories to fade or fail (*Petition of Provoe*, 17 F.R.D. 183 (D. Md.), affirmed, 350 U.S. 857; cf. *Klopper v. North Carolina, supra*), or has been actually established on a showing of the death or unavailability of witnesses and the loss of material records (*Dickey v. Florida*, 398 U.S. 30; *United*

*States v. Mann*, 291 F. Supp. 268 (S.D.N.Y.).<sup>11</sup> By contrast, where such prejudice to the defense of the case has not been present, this Court has upheld the delay as constitutionally permissible. See *United States v. Ewell*, *supra*, 383 U.S. at 120; *Barker v. Wingo*, *supra*, 407 U.S. at 534.

Thus, in such situations, whatever interests society might otherwise have in pressing a particular prosecution, those interests are deemed outweighed by the injury to the accused if a trial is permitted to go forward or if a conviction is permitted to stand. The remedy of dismissal is dictated by the very nature of the constitutional violation that has been found to exist. And it is in this context, we believe, that this Court made the statement in *Barker* (407 U.S. at 522) that dismissal "is the only possible remedy."

But it does not follow, we submit, that the same remedy—one which the Court in *Barker* characterized as "unsatisfactorily severe" (407 U.S. at 522)—must be rigidly applied in all cases involving a denial of the constitutional right to a speedy trial. To the extent that the "balancing process" outlined in *Barker* interjects flexibility into the determination of what constitutes a Sixth Amendment violation, there should be similar flexibility in fashioning relief that is correlative with the infringement found. The Constitution does not by its terms preclude such an approach; as long as the relief granted in the particular circum-

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<sup>11</sup> In such circumstances, it has been noted that, quite apart from speedy trial considerations, fundamental notions of due process would eliminate the possibility of a fair trial. See *Dickey v. Florida*, *supra*, 398 U.S. at 38-39 (Harlan, J., concurring).

stances affords adequate protection to the several interests served by the speedy trial guarantee, the constitutional command is fully implemented.

In arguing for a disposition less drastic than outright dismissal in appropriate cases, we urge no more than that the Court use the same flexibility in enforcing the Sixth Amendment right involved here that it has heretofore used to enforce other constitutional rights. In *Weeks v. United States*, 232 U.S. 383, for example, the Court responded to a clear infringement of the right to be secure from unreasonable searches and seizures under the Fourth Amendment by fashioning an exclusionary rule calling for suppression of the illegally obtained evidence. See also *Mapp v. Ohio*, 367 U.S. 643. The Court, however, has determined that the Fourth Amendment values protected by the exclusionary rule do not require that such evidence be inadmissible in all circumstances, but only that it cannot be used against a person whose rights were actually violated. See, e.g., *Alderman v. United States*, 394 U.S. 165, 171-176; *Wong Sun v. United States*, 371 U.S. 471, 492. Similarly, in disposing of a Fifth Amendment claim of self-incrimination based on the possible use in a tax evasion prosecution of prior statements made by the accused taxpayer, the Court ruled, in *United States v. Blue*, 384 U.S. 251, 255, that the appropriate remedy would be to suppress the evidence and its fruits, not to bar the prosecution altogether. In *Miranda v. Arizona*, 384 U.S. 436, in order to vindicate various constitutional rights, the Court formulated an exclusionary rule barring the use of incrimi-

nating statements made by an accused during custodial interrogation if he has not first been advised of those constitutional rights. But this remedy was qualified in *Harris v. New York*, 401 U.S. 222, to permit the use of such statements, not on the government's case in chief, but for purposes of impeachment. And in *Murphy v. Waterfront Commission*, 378 U.S. 52, the Court, having held the Fifth Amendment privilege against self-incrimination applicable to the States through the Fourteenth Amendment (*Malloy v. Hogan*, 378 U.S. 1), implemented the constitutional privilege by formulating its own "use immunity" rule, barring the federal government from using incriminating testimony compelled from state witnesses, or the fruits thereof.<sup>12</sup>

What these cases illustrate is that the Constitution leaves room for the courts to fashion and adjust appropriate remedies for constitutional violations, especially when the violations themselves involve newly developed or recently re-focused constitutional principles.<sup>13</sup>

In like manner, if a Sixth Amendment violation can indeed be found to exist on the facts of this case,

<sup>12</sup> The decision in *Murphy* overruled *Feldman v. United States*, 322 U.S. 487, which allowed the use of testimony compelled in exchange for a grant of state immunity to secure a conviction for a federal offense.

<sup>13</sup> By analogy, judicial development of the harmless error rule was to allow courts "to discontinue using reversal as a 'necessary' remedy for particular errors and to 'substitute judgment for the automatic application of rules \* \* \*'" (*Chapman v. California*, 386 U.S. 18, 48-49 (Harlan, J., dissenting)).

this Court, rather than mechanically ordering dismissal of the indictment, can properly approve a remedy tailored to the peculiar circumstances presented. As we have pointed out, the delay here resulted in no prejudice to petitioner in terms of oppressive pretrial incarceration or impairment of his defense, two of the three evils which the speedy trial right is designed to protect against. See *United States v. Ewell*, *supra*, 383 U.S. at 120. To the extent that the third form of prejudice to the accused—*i.e.*, anxiety and concern caused by pretrial delay (*ibid.*)—was at all implicated, it is agreed that petitioner's concern related only to the time lost in commencing his federal sentence. The court of appeals thus fashioned a remedy to cure the only prejudice that was claimed. By giving petitioner credit on his maximum five-year federal sentence for the period that elapsed between indictment and arraignment, the court fully vindicated the interests the court found adversely affected in violation of the speedy trial clause, and it did so in a manner which even petitioner suggested would be appropriate in his briefs below.<sup>14</sup>

Nor do the societal interests served by this constitutional safeguard (see *Barker v. Wingo*, *supra*, 407 U.S. at 519-521) require more drastic relief in the

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<sup>14</sup> In the conclusion to both his main brief and his reply brief in the court below, copies of which are on file with the Clerk of this Court, petitioner urged as alternative relief on finding a speedy trial violation that the court could "set aside the original sentence imposed with instructions that a new sentence be imposed, taking into consideration the delay complained of in this case."

present context. "The public is concerned with the effective prosecution of criminal cases, both to restrain those guilty of crime and to deter those contemplating it" (*Dickey v. Florida, supra*, 398 U.S. at 42-43 (Brennan, J., concurring)). The delay involved here did not under the circumstances "reduce the capacity of the government to prove its case" (398 U.S. at 42), as the court below expressly noted (App. 21). It also imposed none of the burdens on society that are usually associated with pretrial incarceration (see *Barker v. Wingo, supra*, 407 U.S. at 520-521), since petitioner was lawfully in prison in Nebraska on a state conviction during the entire period. And finally, because we do not deal here with deliberate government delay designed to obtain an advantage over the accused, there is no call for the heavy-handed treatment urged by petitioner which might in other circumstances be warranted to "penaliz[e] official abuse of the criminal process and discourag[e] official lawlessness" (*Dickey v. Florida, supra*, 398 U.S. at 43 (Brennan, J., concurring)). Rather, in these special circumstances, assuming *arguendo* a constitutional violation, we agree with the court of appeals that "the societal interest in trying people accused of crime, rather than granting them immunization because of legal error \* \* \*" (*United States v. Ewell, supra*, 383 U.S. at 121), is best served by fashioning a new sentence to cure the possible prejudice caused by the delay, much the same as this Court contemplated in *Ewell* (383 U.S. at 123).

In his brief in this Court, petitioner recognizes the care and precision manifested by the court of appeals

in fashioning a remedy: "And so the court [of appeals] decided that the proper remedy was to give back to the Petitioner what the Government, by its unreasonable delay in bringing him to trial, had taken away—259 days" (Pet. Br. 12). "The remedy was clearly compensatory," he conceded (*ibid.*), but asserts that it was error merely to "compensate" him for the infringement that was found to have taken place. Prior decisions of this Court, discussed above, however, show clearly that the correct approach in fashioning a remedy for a particular defendant is to try to restore him to the position in which he would have been if the objectionable conduct had not taken place, rather than to penalize society by giving him complete amnesty. Only last Term the Court upheld the constitutional sufficiency of a grant of "use immunity," in lieu of the complete "transactional immunity" sought, in compelling testimony over a claim of Fifth Amendment privilege; the explicit rationale was that the more limited immunity "leaves the witness and the prosecutorial authorities in substantially the same position as if" the witness had been allowed to stand on his constitutional privilege. *Kastigar v. United States*, 406 U.S. 441, 462.

The same attempt to provide redress to the defendant rather than to visit retribution on the government and the public should apply in speedy trial cases. If there has been irretrievable prejudice to the accused's ability to defend himself because of an unreasonable delay in bringing him to trial, the traditional remedy of dismissal of the charges may be the

only available one, since by hypothesis his presumption of innocence and right to be free of unjust conviction have been illegally denied and cannot readily be rectified in any other way.<sup>15</sup> In the present case, however, the peculiar nature of the Sixth Amendment violation found made it practicable and just to restore petitioner's "right"—by giving him back the only thing he could possibly have lost by reason of the delay, that is, the opportunity to have nine more months of his federal sentence served concurrently with the state sentence he was in any event serving.

Petitioner suggests several reasons why such a disposition is unsatisfactory. First, he argues that the court of appeals' formulation of a remedy less drastic than dismissal—one which left standing the judgment of conviction—was primarily motivated by the guilty verdict, which the court could not properly consider. This argument misapprehends the significance of the court's reference to the sufficiency of the evidence (App. 21). In discussing the remedy to be fashioned, the court of appeals pointed out simply that the ten-month delay affected neither the government's capacity to prove its case (see *Dickey v. Florida, supra*, 398 U.S. at 42 (Brennan, J., concurring)) nor the defendant's ability to present a defense (*Barker v.*

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<sup>15</sup> A situation could be posited in which even prejudice to the defense need not necessarily lead to an absolute discharge. If, for example, the only prejudice was the absence from the country of a key defense witness because of trial delays, the return of the witness might make a new trial, rather than dismissal of the indictment, the proper remedy. Of course in deciding that question a court would have to weigh all of the other factors and interests described in *Barker v. Wingo*.

both the societal and by the speedy trial (S. at 532).<sup>16</sup> It thus looked to accordingly. the individual interests protected

A second argument clause, and fashioned its remedy viewing court must

court whose decision made by petitioner is that a re-limited to granting lace itself in the position of the have and should have is under review, and is therefore (Pet. Br. 5-7, 9-10) the kind of remedy that could that proposition, an been awarded by the lower court either by the general Petitioner cites no authority for by the language of d his position is unsupported 2106, which makes practice of appellate courts or rigid empathy, the b the relevant statute, 28 U.S.C. section provides:

The Supreme substantial justice, rather than appellate juris asis for appellate review. That cate, set aside

or order of a e Court or any other court of for review, and iction may affirm, modify, va-rect the entry or reverse any judgment, decree, decree, or ord court lawfully brought before it ceedings to be may remand the cause and di-circumstances. of such appropriate judgment,

But in any event, er, or require such further pro-sued the same course i had as may be just under the later did if, on the pret

an infringement of the district court could have pur-n this case as the court of appeals

<sup>16</sup> The court of appea tion is raised about the rial dismissal motion, it had found fendant's guilt, and, as he Sixth Amendment guarantee. having been prejudiced in

s stated (App. 21): "Here no ques-sufficiency of the evidence showing de- we have said, he makes no claim of a presenting his defense."

Thus, rather than ordering outright dismissal of the indictment, the district court in such circumstances could have allowed the case to go to trial, but ruled that, in the event of conviction, petitioner would be given credit on his sentence for the impermissible delay.<sup>17</sup>

Petitioner also argues that the remedy devised in this case is "too forgiving of carelessness, sloth, and negligence on the part of Government prosecutors" (Pet. Br. 14). But it is not the function of the speedy trial right to act as a disciplinary measure in all cases of unexcused delay. As we have already pointed out, the underlying purpose of the constitutional guarantee is to protect the various interests which society and the accused have in a prompt disposition of pending prosecutions. To that end, the remedy fashioned in response to a denial of a speedy trial should relieve the accused of the prejudice he has suffered as a result of the impermissible delay, while simultaneously accommodating to the fullest extent possible society's interest in the effective prosecution of criminal cases.

In many situations where a balancing of the four factors outlined in *Barker* indicates a Sixth Amendment violation, dismissal of the indictment may be the only appropriate relief. Two obvious examples are where the delay impedes the accused's ability to de-

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<sup>17</sup> This approach is similar to the one required by federal statute (18 U.S.C. 3568) for an accused who, unlike petitioner, has been detained in federal custody prior to trial solely because he was denied release on bond. Under the statute, he is entitled to credit on his federal sentence for the period of his confinement while awaiting trial on that charge.

fend himself or where it is used by the prosecutor as an intentional device to gain tactical advantages. Cf. *United States v. Marion, supra*, 404 U.S. at 324. But occasionally, as in the present case, the circumstances of the delay, and its minimum prejudicial effect, may well be such that the drastic remedy of dismissal is both disproportionate to the harm suffered by the accused and inconsistent with the societal interest in proceedings with the trial.<sup>18</sup> We urge only that in such instances the courts be permitted to tailor the remedy to fit the constitutional violation.

Nor, we submit, is there any substance to petitioner's position that the injection of this amount of flexibility into the remedial aspects of the Sixth Amendment speedy-trial inquiry will encourage prosecutors to give low-priority treatment to cases of the sort involved here. Delay in any criminal case carries with it the potential of prejudicing either the defense or the prosecution, or both. To the extent that the delay becomes constitutionally impermissible, it will always present a real possibility that the indictment will be dismissed. The fact that a court might in exceptional circumstances fashion less drastic relief on finding a speedy trial violation does not remove this spectre of dismissal, and thus prosecutors can ill-afford to take the calculated risk suggested by petitioner.

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<sup>18</sup> Compare *Illinois v. Somerville*, No. 71-692, decided February 27, 1973, holding that the absence of definable prejudice and the "ends of public justice" precluded a finding that the double jeopardy clause of the Fifth Amendment barred a retrial.

There are, moreover, other factors which, as a practical matter, guard against prosecutorial inertia. Rule 48(b) of the Federal Rules of Criminal Procedure authorizes dismissal of a criminal case if the district court finds that there has been "unnecessary delay" in securing an indictment or in bringing a defendant to trial, even in the absence of a constitutional denial of speedy trial. See *Mamn v. United States*, 304 F. 2d 394 (C.A.D.C.). In addition, under Rule 50(b), as recently promulgated, district courts are in the process of devising plans for minimizing undue delay and insuring prompt disposition of criminal cases.<sup>19</sup> Furthermore, it is within the power of the accused himself to demand a speedy trial if he is dissatisfied with the pace at which his case seems to be proceeding. See *Barker v. Wingo, supra*, 407 U.S. at 528-529. In these circumstances, the theoretical suggestion that prosecutors might interpret the decision below, if left undisturbed, as removing all impetus to proceed with responsible promptness in certain types of cases is pragmatically unsound.

Accordingly, like the court below, "we know of no reason why less drastic relief [than dismissal of the indictment] may not be granted in appropriate cases" (App. 21). And, assuming *arguendo* that petitioner

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<sup>19</sup> See also, American Bar Association, Project on Minimum Standards for Criminal Justice, *Speedy Trial* 14-16 (Approved draft 1968).

was denied his constitutional right to a speedy trial, this in our view is such a case.

**CONCLUSION**

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APRIL 1973.

Slip Opinion

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337.

## SUPREME COURT OF THE UNITED STATES

### Syllabus

#### STRUNK, AKA WAGNER *v.* UNITED STATES

#### CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 72-5521. Argued April 24, 1973—Decided June 11, 1973

Petitioner was convicted of a federal offense and was sentenced to a term of five years, to run concurrently with a sentence of one to three years that he was serving pursuant to a state-court conviction. Before trial, the District Court denied his motion to dismiss the federal charge on the ground that he had been denied a speedy trial. The Court of Appeals reversed, holding that he had been denied a speedy trial, but that the "extreme" remedy of dismissal of the charges was not warranted. The case was remanded to the District Court to reduce the sentence by 259 days, to compensate for the unnecessary delay that had occurred between the return of the indictment and petitioner's arraignment. The Government did not file a cross-petition for certiorari challenging the finding of denial of a speedy trial. *Held*: In this case, the only question for review is the propriety of the remedy fashioned by the Court of Appeals. In light of the policies underlying the right to a speedy trial, dismissal must remain, as noted in *Barker v. Wingo*, 407 U. S. 514, 522, "the only possible remedy" for deprivation of this constitutional right. Pp. 2-6.

467 F. 2d 969, reversed and remanded.

BURGER, C. J., delivered the opinion for a unanimous Court.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

## SUPREME COURT OF THE UNITED STATES

No. 72-5521

Clarence Eugene Strunk,	} On Writ of Certiorari to the	
Petitioner,		United States Court of
v.		Appeals for the Seventh
United States.	} Circuit.	

[June 11, 1973]

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

Petitioner was found guilty in United States District Court of transporting a stolen automobile from Wisconsin to Illinois in violation of 18 U. S. C. § 2312 and was sentenced to a term of five years. The five-year sentence was to run concurrently with a sentence of one to three years that petitioner was then serving in the Nebraska State Penitentiary pursuant to a conviction in the courts of that State.

Prior to trial, the District Court denied a motion to dismiss the federal charge in which petitioner argued that he had been denied his right to a speedy trial. At trial, petitioner called no witnesses and did not take the stand; the jury returned a verdict of guilty. The Court of Appeals reversed the District Court, holding that petitioner had in fact been denied a speedy trial. However, the court went on to hold that the "extreme" remedy of dismissal of the charges was not warranted; the case was remanded to the District Court to reduce petitioner's sentence to the extent of the 259 days in order to compensate for the unnecessary delay which had occurred between return of the indictment and petitioner's arraignment.

## I

Certiorari was granted on petitioner's claim that, once a judicial determination has been made that an accused has been denied a speedy trial, the only remedy available to the court is "to reverse the conviction, vacate the sentence and dismiss the indictment." No cross-petition was filed by the Government to review the determination of the Court of Appeals that the defendant had been denied a speedy trial. The Government acknowledges that in its present posture, the case presents a novel and unresolved issue, not controlled by any prior decisions of this Court.

The Court of Appeals stated that the 10-month delay which occurred was "unusual and call[ed] for explanation as well as justification." The Government responded that petitioner had, after receiving the proper warnings, freely admitted his guilt to an FBI agent while incarcerated in the Nebraska Penitentiary, and had stated that he intended to demand a speedy trial under Rule 20 of the Federal Rules of Criminal Procedure. The Government claimed that it had postponed prosecution because of petitioner's reference to Rule 20, and consequently, that a large portion of the delay which ensued was attributable to petitioner. The Court of Appeals regarded this explanation as tenuous; it also rejected the lack of staff personnel in the United States Attorney's Office as a justification for the delay. The entire course of events from the time of arrest through the Court of Appeals plainly placed the Government on notice that the speedy trial issue was being preserved by the accused and would be pressed, as indeed it has been.

On this record, it seems clear that petitioner was responsible for a large part of the 10-month delay which occurred and that petitioner neither showed nor claimed that the preparation of his defense was prejudiced by reason of the delay. It may also well be cor-

rect that the United States Attorney was understaffed due to insufficient appropriations and, consequently, was unable to provide an organization capable of dealing with the rising caseload in his office, especially with respect to criminal cases. Unintentional delays such as overcrowded courts or understaffed prosecutors are among the factors to be weighed less heavily than intentional delay, calculated to hamper the defense, in determining whether the Sixth Amendment has been violated but, as we noted in *Barker v. Wingo*, 407 U. S. 514, 531, they must

“nevertheless . . . be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant.”

This served to reaffirm what the Court held earlier in *Dickey v. Florida*, 398 U. S. 30, 37-38 (1970)

“Although a great many accused persons seek to put off the confrontation as long as possible, the right to a prompt inquiry into criminal charges is fundamental and the duty of the charging authority is to provide a prompt trial.” (Footnote omitted.)<sup>1</sup>

However, in the absence of a cross-petition for certiorari, questioning the holding that petitioner was denied a speedy trial, the only question properly before us for review is the propriety of the remedy fashioned by the Court of Appeals. Whether in some circumstances and as to some questions the Court might deal with an issue in the setting of constitutional claims, absent its being raised by cross-petition, we need not resolve. Suffice it that in the circumstances presented here in which the speedy trial issue has been pressed by the accused from the time of arrest forward and resolved in his favor, we

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<sup>1</sup> American Bar Assn. Project on Standards for Criminal Justice, Speedy Trial (approved draft), at 27-28 (hereafter “ABA, Speedy Trial”).

are not disposed to examine the issue since we must assume the Government deliberately elected to allow the case to be resolved on the issue raised by the petition for certiorari.

## II

Turning to the remaining question of the power of the Court of Appeals to fashion what it appeared to consider as a "practical" remedy, we note that the court clearly perceived that the accused had an interest in being tried promptly, even though he was confined in a penitentiary for an unrelated charge. Under these circumstances,

"... the possibility that the defendant already in prison might receive a sentence at least partially concurrent with the one he is serving may be forever lost if trial of the pending charge is postponed. [Footnote omitted.]" *Smith v. Hoey*, 393 U. S. 374, 378.

The Court of Appeals went on to state:

"The remedy for a violation of this constitutional right has traditionally been the dismissal of the indictment or the vacation of the sentence. Perhaps the severity of that remedy has caused courts to be extremely hesitant in finding a failure to afford a speedy trial. Be that as it may, we know of no reason why less drastic relief may not be granted in appropriate cases. Here no question is raised about the sufficiency of evidence showing defendant's guilt, and, as we have said, he makes no claim of having been prejudiced in presenting his defense. In these circumstances, the vacation of the sentence and a dismissal of the indictment would seem inappropriate. Rather, we think the proper remedy is to remand the case to the district court with direction to enter an order instructing the Attorney General to credit the defendant with the period of time

elapsing between the return of the indictment and the date of the arraignment. FED. R. CRIM. P. 35 provides that the district court may correct an illegal sentence at any time. We choose to treat the sentence here imposed as illegal to the extent of the delay we have characterized as unreasonable."

It is correct, as the Court of Appeals noted, that *Barker* prescribes "flexible" standards based on practical considerations. However, that aspect of the holding in *Barker* was directed at the process of determining whether a denial of speedy trial had occurred; it did not deal with the remedy for denial of this right. By definition such denial is unlike some of the other guarantees of the Sixth Amendment. For example, failure to afford a public trial, an impartial jury, notice of charges, or compulsory service can ordinarily be cured by providing those guaranteed rights in a new trial. The speedy trial guarantee recognizes that a prolonged delay may subject the accused to an emotional stress that can be presumed to result in the ordinary person from uncertainties in the prospect of facing public trial or of receiving a sentence longer than, or consecutive to, the one he is presently serving—uncertainties that a prompt trial removes. *Smith v. Hooey*, 393 U. S., at 379; *United States v. Ewell*, 383 U. S. 116, 120. We recognize, as the Court did in *Smith v. Hooey*, that the stress from a delayed trial may be less on a prisoner already confined, whose family ties and employment have been interrupted,<sup>2</sup> but other factors

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<sup>2</sup> It can also be said that an accused released pending trial often has little or no interest in being tried quickly; but this, standing alone, does not alter the prosecutor's obligation to see to it that the case is brought on for trial. The desires or convenience of individuals cannot be controlling. The public interest in a broad sense, as well as the constitutional guarantee, command prompt disposition of criminal charges.

such as the prospect of rehabilitation may also be affected adversely. The remedy chosen by the Court of Appeals does not deal with these difficulties.

The Government's reliance on *Barker* to support the remedy fashioned by the Court of Appeals is further undermined when we examine the Court's opinion in that case as a whole. It is true that *Barker* described dismissal of an indictment for denial of a speedy trial as an "unsatisfactorily severe remedy." Indeed, in practice, "it means that a defendant who may be guilty of a serious crime will go free, without having been tried." 407 U. S., at 522. But such severe remedies are not unique in the application of constitutional standards. In light of the policies which underlie the right to a speedy trial, dismissal must remain, as *Barker* noted, "the only possible remedy." *Ibid.*

Given the unchallenged determination that petitioner was denied a speedy trial,<sup>3</sup> the judgment of conviction must be set aside; the case is therefore remanded to the Court of Appeals to direct the District Court to set aside the judgment, vacate the sentence, and dismiss the indictment.

*Reversed and remanded.*

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<sup>3</sup> ABA, Speedy Trial, at 40-41.